

**Ark Las Vegas Restaurant Corporation and Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Workers International Union, AFL-CIO.** Cases 28-CA-14228, 28-CA-14288-2, 28-CA-14288-4, 28-CA-14288-6, 28-CA-14288-7, 28-CA-14376, 28-CA-14463, and 28-CA-14543

September 25, 2001

# DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On September 21, 1998, Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed cross-exceptions and supporting briefs. The General Counsel filed an answering brief to the Respondent's exceptions. The Respondent filed an answering brief to the cross-exceptions and a reply brief to the General Counsel's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup>

<sup>1</sup> There were no exceptions to the judge's recommendation to dismiss the complaint allegations that the Respondent unlawfully threatened, disciplined and/or discharged employees Michael Thomasson, Sandra Lopez, Jesus Araiza, Roger Trude, Maria Guadalupe Carillo, Bernardino Hernandez Cruz, and David Hernandez. There were also no exceptions to the judge's recommendation to dismiss the complaint allegation that the Respondent maintained a rule unlawfully prohibiting nonemployees from distributing or soliciting employees on Ark premises. Accordingly, we find it unnecessary to pass on the judge's application of *Nicks*, 326 NLRB 997 (1998), remanded in pertinent part sub nom. *Food & Commercial Workers Local 400 v. NLRB*, 222 F.3d 1030 (D.C. Cir. 2000), supplemental decision on remand 332 NLRB 1424 (2000).

In adopting the judge's finding that the Respondent's prohibition on wearing union buttons or pins on uniforms and work clothes violated Sec. 8(a)(1), we agree with the judge that the Respondent's status as a retail employer does not, standing alone, constitute a special circumstance justifying the proscription of union insignia. See *United Parcel Service*, 312 NLRB 596 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994); *Nordstrom, Inc.*, 264 NLRB 698 (1982). As the judge found, the Respondent never told employees that the size or color of the buttons were the problem and at least half of the employees who wear buttons do so outside the direct presence of the public.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) by discharging employee Jesus Serna, we do not rely on the judge's finding that Serna's supervisor, Valerio Rodriguez, did not speak to Serna about his poor job performance. The evidence establishes that on two occasions Rodriguez spoke with him concerning his poor work. In adopting the judge's finding that the Respondent vio-

and to adopt the recommended Order<sup>3</sup> as modified below.

1. The judge found that the Respondent violated Section 8(a)(3) of the Act by issuing employee Ron Isomura a written warning for leaving breaded chicken tenders unrefrigerated overnight. Characterizing the incident as relatively harmless, the judge found that the Respondent did not attempt to verify Isomura's explanation that lead prep Ricky Takaya gave him approval to leave the raw chicken out at the end of his shift. Hence, the judge concluded that the warning was motivated by Isomura's protected activities.<sup>4</sup> The Respondent excepts, arguing that Isomura's explanation was investigated and that his mishandling of food products was a health code violation, which fully justified the warning.

We find merit in the Respondent's exceptions. It is undisputed that Isomura left raw chicken unrefrigerated and that the mishandling of the chicken violated the local health code. We further find, contrary to the judge, that Isomura's explanation was investigated prior to the issuance of the discipline. Head Chef Robert DeFazio testified that he spoke with Takaya, and that Takaya denied giving Isomura permission.<sup>5</sup> Accordingly, we find that the Respondent has established that it would have issued the warning even in the absence of Isomura's protected activity and therefore we dismiss this complaint allegation.

lated Sec. 8(a)(3) by discharging employee Sandra Jordan, we do not rely on the judge's finding that Jordan had not been counseled. The record shows that Jordan was in fact counseled about her work performance.

Finally, in adopting the judge's finding that the Respondent violated Sec. 8(a)(3) by laying off employee David Schafer in April 1997, we find it unnecessary to rely on subsequent events when he sought reemployment with the Respondent in August 1997.

<sup>2</sup> In adopting the judge's recommendation to dismiss the complaint allegations that the Respondent's confidentiality rules and rules regulating employee conduct contained in its employee handbook violated Sec. 8(a)(1) of the Act, we agree with the judge that the rules at issue here are largely identical to standards of conduct found lawful in *Lafayette Park Hotel*, 326 NLRB 824 (1998).

Member Liebman dissented in *Lafayette Park*, and Member Walsh, who was not a Member of the Board when *Lafayette Park* was decided, agrees with her dissent. In the absence of a current Board majority to overrule *Lafayette Park*, Members Liebman and Walsh agree with Member Truesdale that the judge correctly applied that precedent here in recommending that these complaint allegations be dismissed.

<sup>3</sup> We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

<sup>4</sup> On March 12, 1997, Isomura was observed distributing union literature in the employee locker room. Supervisor Bill Conn interceded, removed Isomura, and discharged him. Although the discharge was later rescinded, the judge found, and we agree, that the Respondent's treatment of Isomura violated Sec. 8(a)(3) and (1).

<sup>5</sup> Takaya did not testify at the hearing.

2. The judge found that the Respondent violated Section 8(a)(1) when its manager, Christine Flores, told employee Yvonne Spears that the Respondent could not afford to pay the wage rates set forth in some union flyers. Citing *NLRB v. Gissel Packing Co.*,<sup>6</sup> the judge concluded that Flores' statement was not a permissible "fact-based" prediction because she did not state her reasoning to Spears and that, without such an objective explanation, the statement became an unlawful threat.

Contrary to the judge, we find that Flores' comment was simply an observation that the Respondent could not afford to pay the Union's wage rate and was not a threat of reprisal against employees for their union activities. *Hampton Inn*, 309 NLRB 942 (1992). Accordingly, we shall dismiss this allegation of the complaint.

3. The Charging Party and the General Counsel except to the judge's failure to order the Respondent to rescind certain handbook rules that he found unlawful: i.e., rules prohibiting employees from wearing union buttons on their uniforms or other work clothing, barring employees from the premises more than 30 minutes before their shift and requiring them to leave 30 minutes after their shift, and barring employees from distributing union literature and soliciting union membership in the nonwork area of the employee dining room. The General Counsel and Charging Party also except to the judge's failure to order that the Respondent publicize the rescission in the same fashion that the unlawful rules were publicized. We find merit in these exceptions<sup>7</sup> and shall modify the recommended Order accordingly.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Ark Las Vegas Restaurant Corporation, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(h) and reletter the subsequent paragraphs.

2. Insert the following as paragraph 2(a) and reletter the subsequent paragraphs.

"(a) Rescind its rules contained in its employee handbook prohibiting employees from wearing union buttons or pins on their uniforms or other work clothing, barring employees from the premises more than 30 minutes before their shift and requiring them to leave within 30 minutes of the time their shifts end, and barring employees from distributing union literature and soliciting union membership in the nonwork area of the employee dining

room; and notify employees that the rules have been rescinded to the same extent that the unlawful rules were publicized."

3. Substitute the following for paragraph 2 (d).

"(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

4. Substitute the attached notice for that of the administrative law judge.

#### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize  
To form, join, or assist any union  
To bargain collectively through representatives of their own choice  
To act together for other mutual aid or protection  
To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain or enforce written or unwritten rules prohibiting employees from wearing union buttons or pins on their uniforms or other work clothing.

WE WILL NOT direct employees to remove union buttons from their uniforms.

WE WILL NOT threaten to discharge or discipline employees for insisting upon their right to wear union buttons or pins on their uniforms.

WE WILL NOT physically remove union buttons from the uniforms of employees.

WE WILL NOT tell employees that they must comply with an illegal rule barring them from distributing union literature or soliciting union membership in the employee dining room.

WE WILL NOT tell employees that they must comply with an illegal rule barring them from arriving on the premises more than 30 minutes before their shift begins and requiring them to leave within 30 minutes of the time their shift ends.

<sup>6</sup> 395 U.S. 575, 617-619 (1969).

<sup>7</sup> *Marriott Corp.*, 313 NLRB 897 (1994).

WE WILL NOT intimidate employees from engaging in union activity by putting them on the spot with questions about the Union we know they cannot answer.

WE WILL NOT tell employees they cannot speak to their coworkers, whether in person, by telephone, or whether on or off duty.

WE WILL NOT maintain any rule which bars employees from our premises 30 minutes before their shift or requires them to leave within 30 minutes after their shift.

WE WILL NOT apply our no-solicitation, no-distribution rule to employee union organizers by defining nonworking areas such as the employee dining room as a working area, thereby preventing employees from exercising their right to lawfully distribute union literature and solicit union membership in nonwork areas.

WE WILL NOT discharge or discipline employees because of their sympathies, desires, or activities on behalf of Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Workers International Union, AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our unlawful rules contained in the employee handbook prohibiting employees from wearing union buttons or pins on their uniforms or other work clothing, barring employees from the premises more than 30 minutes before their shift and requiring them to leave within 30 minutes of the time their shifts end, and barring employees from distributing union literature and soliciting union membership in the nonwork area of the employee dining room; and WE WILL notify employees that the rules have been rescinded to the same extent that the unlawful rules were publicized.

WE WILL, within 14 days of the Board's Order, offer Ron Isomura, Vertis Manuel, Jorge Aguilar, David Schafer, Sandra Jordan, and Jesus Serna full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Ron Isomura, Vertis Manuel, Jorge Aguilar, David Schafer, Sandra Jordan, Jesus Serna, Saam Naaghdi, and Clara Montano whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges or discipline, whichever is applicable, levied upon the employees named above and, WE WILL,

within 3 days thereafter, notify them in writing that we have done so and that the discharge or discipline will not be used against them in any way.

## ARK LAS VEGAS RESTAURANT CORPORATION

*Scott B. Feldman and Nathan Albright*, for the General Counsel.

*Michael A. Taylor and Celeste M. Wasielewski (Pantaleo, Lipkin and Moss)*, of Washington, D.C., for the Respondent.

*Kevin Kline, Organizer*, Culinary and Bartenders Union, Las Vegas, Nevada, for the Charging Party; Brief by *Michael T. Anderson (Davis, Cowell and Bowe)*, of San Francisco, California.

## DECISION

### STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Las Vegas, Nevada, on 7 hearing days between October 6 and October 15, 1997.<sup>1</sup> The original charges were filed on March 12 by Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with Hotel Workers and Restaurant Employees International Union, AFL-CIO (the Union); those charges were later amended and additional charges were filed. The fourth consolidated complaint was issued by the Regional Director for Region 28 on September 17, and asserts that Respondent, Ark Las Vegas Restaurant Corporation, has violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) in a variety of ways. Respondent denies the commission of any unfair labor practices.

### Issues

The issues raised by the complaint fall within three categories: company rules alleged to interfere with Section 7 rights; the application, rescission, and sub rosa return of an antibutton rule; and a variety of discharges, suspensions, and warnings levied upon union activists.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent, a Nevada corporation, operates the restaurants located in the New York-New York Hotel and Casino in Las Vegas, Nevada.<sup>2</sup> Although it did not open for business until January 3, its business volume is so large that it readily admits that its annual gross volume exceeds \$500,000 and it annually purchases goods and materials directly from sources outside the State of Nevada in excess of \$50,000. It therefore admits, and I

<sup>1</sup> All dates are 1997 unless otherwise noted.

<sup>2</sup> Ark Las Vegas is a subsidiary of a similarly named parent corporation which, through subsidiaries, operates restaurants on the East Coast, including New York City and the Washington, D.C. area.

find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. Background

The New York-New York Hotel and Casino (NY-NY) is a large theme hotel and gaming facility located on South Las Vegas Boulevard. It opened for business on January 3. Unlike the vast majority of such businesses it does not operate the restaurants and food service outlets in the building. Instead, it has contracted with Respondent to run the them. Respondent asserts that it is a tenant of certain areas of the property, based upon the written agreements which it has with NY-NY. Whatever the "lease" may say, it is better described as the food service concessionaire for NY-NY.

In the performance of that role Respondent runs the following restaurants within the hotel: America (which seats about 500 customers); Gallagher's (a steakhouse); Gonzalez y Gonzalez (GYG) a Mexican restaurant; The Village Streets, a food court consisting of ten fast food outlets; and the Employee Dining Room (EDR) (350 seats; open only to employees of NY-NY, Respondent and the Feld Entertainment theater company employees). In addition, it provides room service to hotel guests and banquet catering within the hotel. In support of this operation it has kitchens for each restaurant and the EDR, plus a separate production kitchen which prepares certain food items common to the restaurants, and a stewards department which performs the necessary dishwashing, cleanup, and general janitorial functions. It is a very big food service operation, employing about 900 persons on a 7-day-per week, 24-hour-per-day basis.

Respondent's president is an individual named Michael Weinstein. He resides in New York City. The daily management of Ark Las Vegas is the responsibility of Paul Gordon, a senior corporate vice president. Each restaurant has a general manager who, with his/her assistant general manager, has overall responsibility for each restaurant. On the kitchen side, Ark has an executive chef, Damien McEvoy. He has an assistant, Paul Savoy. Working for them are the chefs and sous (assistant) chefs at each restaurant and for each shift. In addition, there is a chief steward, Valerio Rodriguez, who heads the cleanup crews and dishwashers. All of the persons holding these jobs are supervisors within the meaning of Section 2(11) of the Act.

Respondent began hiring rank-and-file employees in the late Fall of 1996, having established a hiring office on Harmon Avenue somewhat off Las Vegas Boulevard. As early as November it had created an employee handbook containing, among other things, certain rules of behavior for employees. Many of the rules contained therein are under scrutiny here.

In December 1996, the Union actually began its organizing drive, attempting to sign up employees who had been hired at the Harmon Avenue office. It is not clear to what duties these persons were assigned prior to the hotel opening on January 3, but obviously large numbers were hired and a significant amount of orientation and training was underway in the weeks

before the opening. Gordon and other management officials were aware of the Union's effort. Indeed, it would have been difficult to ignore the Union's presence as its effort utilized bullhorns and video cameras. At one point in December union organizers entered the Harmon office demanding to see Gordon, who wasn't there. When that failed they called Weinstein at his home in New York City by cellular telephone, insisting that he "recognize the card count," a demand for recognition. Weinstein was occupied with a holiday family matter at the time and declined to deal with the Union in such a fashion.

This early effort to obtain recognition did not succeed and for a time the Union allowed the noise to subside. However, it was busy and about March 11 a union organizing committee consisting of about 30 employees sent Gordon a letter announcing their intention to organize Respondent's employees. The signatures on the letter clearly advised Respondent of the identities of the committee members. At the same time, committee members, as well as other employees, began wearing union buttons on their working clothes. There were at least two types of buttons. One said "Local 226 Culinary Workers COMMITTEE LEADER" and the other said "UNION SOLIDARITY Culinary Local 226 Las Vegas." They incorporated small figures of persons wearing uniforms typical of food service employees. Each button is about 1-3/4 inches in diameter. Union literature also made an appearance.

It is the arrival of the letter, the advent of the buttons, and the appearance of union literature which triggered many of the events which followed. The buttons immediately came into conflict with the rule prohibiting them. For that reason it is appropriate to begin with the button rule and to concern ourselves with the other rules as well.

### B. The Button Rule: *The Buttons and Employees Naghdi, Montaño, Kiddy, and Jordan*

The button rule, found on page 15 of the handbook, reads as follows:

Buttons, badges, or emblems may not be worn in public areas, except for name badges or buttons issued by the Company. No unauthorized stickers, pictures, buttons or other graphic forms may be placed on your name tag or badge.

Saam Naghdi is a waiter at GYG. On March 11 or 12 he appeared for work wearing the committee leader button. He was also a signer of the March 11 letter. The general manager of GYG at the time was Christina Flores. Thinking it might be a button from a concert, she looked at it to determine what it said. When Naghdi told her, she replied, "I don't think you can wear that here." He explained that he had the legal right to do so, but she said, "I don't think they would like it." She walked away, consulted with the human resources department, and returned 5 minutes later saying it was not part of the uniform. He gave her some union literature which he believed allowed him to wear it. She took it and again consulted with the HR department.

When she came back she said that the paper did not refer to buttons and if he did not remove the button he would have to

clock out. Naghdi refused to remove it and she told him to transfer his tables to another server and to clock out.

Shortly thereafter, she issued him a "counseling review" form asserting he was in violation of the uniform policy and sent him home. He asked her to write that it was a union pin which he had been wearing, but she declined to include a description of the pin, saying only that he was "wearing a pin." He refused to sign the form.

The next day, Flores told Naghdi that the counseling had been voided. It appears that the issue had been bucked to Senior Vice President Gordon who discussed the matter with Respondent's attorneys. After hearing their advice, he had decided to void the discipline. Naghdi says that no one ever told him the discipline was "wrong," but Flores did tell him (though it was not shown to him) that the counseling form had been voided. In addition Flores told him he would be paid for the lost shift. It appears that he was.

Shortly thereafter, Respondent revoked the rule from its manual by placing a notice in each pay envelope advising of the revocation and including a substitute page for the handbook. The notice concluded with a sentence assuring employees that it "will not in any other manner interfere with the rights you and other employees have which are protected by the National Labor Relations Act." As the handbook itself is available only in English, the notice likewise was only in English. Thus, those employees who are literate only in Spanish were not notified of the change.

Executive Chef McEvoy says after the Naghdi incident he told the supervisory staff that it was permissible for employees to wear the buttons, but that he did not instruct the chefs to affirmatively tell the employees that they could do so. Yet whatever message he supposedly tried to express did not get very far.

There is employee testimony, denied in some respects, that the EDR chefs and sous chefs gave button wearers a tough time in March. Clara Montaña, a food prep employee who worked the buffet table, says that EDR head chef Juan Gallegos told her: "Since I was wearing that button he recommended me to take it off. He told me that—that if the owners ever saw me wearing one of these buttons I would be terminated. That was throughout several conversations we held throughout the day." Gallegos did not testify.

She also says that EDR sous chef Don Meza, on March 16 in the presence of chef John Miller, "told me to take off the button, because it was banned . . . at work, we couldn't wear them, it was banned. By wear—he said, also, that by wearing that button I could probably cause some discomfort among co-workers."

Similarly, EDR line cook Randy Kiddy testified that Meza yanked his committee button off:

Q. Was anyone else present, in this conversation?

A. Not that I'm aware of.

Q. And what did Mr. Meza say to you?

A. I came in. I said, you know, "Good morning." And he looked down, and he saw the button, he said "That's not good." And I said, "[ ] how[?]" . . . [H]e said "That's gonna cause you problems." And I said, "How is that

gonna cause me problems?" He said "Because we don't—or they don't like that kind of thing around here."

Q. Okay. Anything else happen?

A. And I told him, I said, "Well, I have the right to wear it. I know I can wear it every day, you know." And he reached out and grabbed it, and pulled it off my chest and threw it on the floor, and walked away laughing.

....

Q. Well, what did you do after Mr. Meza took off your union button?

A. I picked it up and just went back to work, put it back on.

Meza did not testify and Montaña's and Kiddy's testimony is un rebutted.

As late as May 27, according to Sandra Jordan, a bus person in America, assistant general manager Bobbie Rihel, demanded that she remove her "solidarity" button and when she refused, was taken to the office and discharged. Rihel admits discharging Jordan that day, but asserts it was simply due to cumulative shortcomings resulting in Jordan failing to pass her 90-day introductory period. She specifically denies telling Jordan to remove the button.

I resolve the credibility conflict in detail, *infra*, but do credit Jordan on this point.

The principal concern here is how Respondent operated after rescinding the rule against employees wearing buttons. Rather clearly, the Section 7 right to wear buttons, supposedly recognized in the rescission announcement, was not honored.

Analytically, the rule itself is unlawful on its face. In *Malta Construction Co.*, 276 NLRB 1494 (1985), *enfd.* 806 F.2d 1009 (11th Cir. 1986), the Board observed that the Supreme Court in *Republic Aviation Corp.*, 324 U.S. 793 (1945), approved the Board's holding that employees had the right to wear union insignia and stated "The right of employees to wear union insignia at work has long been recognized as reasonable and legitimate form of union activity." 324 U.S. at 802 fn. 7. *Malta* then observed that in *Kendall Co.*, 267 NLRB 963 at 965 (1983), the Board had said "a rule that curtails that employee right [to wear union insignia] is presumably invalid unless special circumstances exist which make the rule necessary to maintain production or discipline, or to ensure safety." Respondent does not contend that there is any special circumstance here, except for a general claim that the rule was consistent with Board holdings that the rule is subject to some limitation in retail industries. Indeed, it revoked the rule, although there is testimony that it would reinstate it if the old rule is found to be lawful. Based upon the cited case law I find it not to have been lawful.

It is true that the buttons in question are colorful and visible due to their size. Yet Respondent has never claimed that the buttons were too large or deprecated the uniforms in some way. In fact, there is no evidence that it ever complained to the Union about the size or nature of the buttons or told employees that the button's size or color was the problem. Nor is there any evidence that any customer ever complained to management about them. Nevertheless, Respondent sought to ban them altogether. To the extent that Respondent claims a special

circumstance due to its status as a retail employer, the argument fails. Beyond that, at least half of the employees who wear buttons do so outside the direct presence of the public, performing their work in kitchens and utility rooms.

Furthermore, I find Respondent's attempt to self-remedy the violation to fail. For a respondent to successfully claim that it has self-remedied a violation of the Act it must meet the test set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). There the Board said that for a repudiation of an unfair labor practice to be effective, it must be timely, unambiguous and to specifically refer to the unlawful conduct. Moreover, the repudiation must be broadly published and no further violations must have occurred. In *Holly Farms*, 311 NLRB 273, 274 (1993), enf'd. 48 F.3d 1360 (4th Cir. 1994),<sup>3</sup> the Board said the employer must admit wrongdoing. Here, at the very least, similar conduct continued to occur. The rule was never effectively repudiated by the publication/rescission of the rule and there was no admission of wrongdoing, a failure which may have contributed to the continued ad hoc enforcement described above.

And, of course, aside from whether the rule is lawful or not, the conduct directed at these employees violated Section 8(a)(1) on essentially the same analysis. Clearly, telling employees they may not wear protected insignia or publicity devices under pain of discipline or discharge, or physical removal, is a self-evident interference and restraint and coercion of those employees seeking to exercise their Section 7 right to wear such items. Moreover, insofar as the attempt to revoke the discipline levied upon Naghdi is concerned, voiding the counseling documentation, like revocation of the rule, did not meet the requirements of *Passavant*, if for no other reason than that the same type of conduct continued to occur and other employees also found themselves unable to exercise that right free of restraint.

### C. The No-Distribution, No-Solicitation Rule

Respondent's rule regulating the distribution of literature and the solicitation of employees is found on page 45 of the employee handbook. It states in its entirety:

In the interest of maintaining a professional business environment and preventing interference with work and inconvenience to others, employees may not distribute literature of any kind, sell merchandise, solicit financial contributions, or solicit for any other cause during work time. Employees who are not on working time may not solicit employees who are on working time for any cause or distribute literature of any kind to them. Furthermore, employees may not distribute literature or printed material of any kind in working areas at any time. For this purpose, the Employee Cafeteria is considered a working area in addition to all the departments managed by Ark Las Vegas.

"Working time" includes all time during which an employee is assigned or engaged in the performance of his

duties, but does not include [sic] breaks, meal periods or other designated relief periods.

"Solicitation" includes, but is not limited to, activities such as requesting charitable contributions, invitations to social events, advertisements for home sales parties or communications with an employee seeking to obtain support for, or participation in an outside group, organization, cause or activity.

Non-employees are prohibited from distributing material or soliciting employees on Ark Las Vegas' premises at any time.

The General Counsel objects to the rule on three grounds. First, it asserts that the employee cafeteria (EDR) is not a working area and Respondent cannot define it as such; second, the use of the term "premises" is overbroad, encompassing non-work areas and creating an ambiguity to the detriment of Section 7 rights of employees, off-duty employees and non-employees; third, the reference to work areas is latently ambiguous and may reasonably be interpreted to include traditional nonwork areas such as locker rooms or the EDR.

Although it is true that some of Respondent's employees (approximately 15 per shift) work in the EDR performing their regular tasks and are "on-duty" when doing so, that restaurant seats some 350 "customers" (NY-NY employees, Feld employees, or Respondent's employees) all of whom are "off-duty" when entering, picking up food, eating or leaving. In fact, Respondent provides one meal per shift to its own employees. The only place to obtain that meal is in the EDR. (See handbook, p. 27.) Thus Respondent induces those employees once per shift to spend off-duty time in that room. Traditionally the Board has held that such an area is a nonwork area in which off-duty employees may distribute union literature or solicit union membership of other off-duty employees. *Harrah's Lake Tahoe Resort*, 307 NLRB 182, 187 fn. 11 (1992). Respondent, in its brief asserts that the prohibition only applies to the "on-duty" employees.<sup>4</sup> That may well be Respondent's interpretation, but the General Counsel is attacking the language of the rule because it does not clearly delimit its currently stated interpretation, thereby allowing for a great deal of misunderstanding.

On March 12, prep cook Ron Isomura began distributing union literature in the locker room. He was observed by a supervisor, Bill Conn, giving such literature to Jesus Araiza who was on his way to work. Conn interceded, removed Isomura, and took him to the office where he was discharged. Gordon later rescinded the discharge. Even so, Respondent's treatment of Isomura clearly violated Section 8(a)(1) for interdicting a protected act and Section 8(a)(3) for the discharge, rescinded or not. I find merit in the General Counsel's analysis. The rule unlawfully bars employees from organizing in a nonwork area.

<sup>3</sup> Case heard by the Supreme Court on other issues. 517 U.S. 392 (1996).

<sup>4</sup> The only on-duty employees likely to speak directly to the off-duty customers on any basis in this cafeteria are two food island attendants, the short order cooks, and the stewards performing cleanup work, perhaps less than half of the shift's employees. (There may also be a "cashier" of some sort who directs the "swiping" of magnetic-stripe employee ID cards to obtain the meal, but that is not clear on this record.)

With respect to the contention made by the General Counsel, but not by the Charging Party, that the rule unlawfully prohibits nonemployee organizers from distributing literature or soliciting employees in the EDR, I find myself bound by the Supreme Court's decision in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); see also *Nicks*', 326 NLRB 997 (1998). Those cases hold that an employer is not obligated to allow nonemployee organizers on the premises if there are reasonable alternatives available which the union may utilize to communicate their message to the employees. Here the EDR is not open to the general public, but only to the employees of the three entities who do business at the site, NY-NY, Feld, and Respondent. Since no one has contended that reasonable alternate means of communication are not available, I conclude that the rule insofar as it bars nonemployee organizers from the EDR is valid.

With respect to nonemployee organizers visiting with off-duty employees in the other restaurants, which are open to the public, the holding must be the same. Until very recently the Board's decision in *Montgomery Ward & Co.*, 288 NLRB 126 (1988), remanded on other grounds 904 F.2d 1156 (7th Cir. 1990), would have required me to permit nonemployee organizers to solicit membership and distribute literature so long as their conduct was not inconsistent with conduct expected of a customer.

However, the Board recently overruled *Montgomery Ward* in *Nicks*', supra. The Board revisited *Montgomery Ward* in light of *Lechmere*. It concluded that *Lechmere* had implicitly overruled the logic of *Montgomery Ward* and determined that it should be overruled explicitly, as it was bound to follow Supreme Court law. Thus, under *Nicks*', an employer may establish a nondiscriminatory rule prohibiting a nonemployee union organizer from distributing material or soliciting membership on its premises at any time, if a reasonable alternative is available. Clearly, the last sentence of Respondent's rule does exactly that. Accordingly, the portion of the complaint which seeks to attack this rule as it prohibits nonemployee union organizers from soliciting membership and distributing literature in Ark's restaurants will be dismissed.

#### D. The Rule Prohibiting Early Arrival or Late Departure

The handbook's misconduct rules, on pages 42-43, prohibit employees from arriving "on the property" more than 30 minutes prior to the start of a shift or staying "on the property" more than 30 minutes after a shift ends unless authorized by a supervisor. They also prohibit an employee from "returning to the Company premises, other than as a guest, during unscheduled hours" unless previously approved.

As in the discussion supra regarding the no-solicitation, no-distribution rules, the use of the word "premises" creates an ambiguity which is unacceptable. Similarly, the use of the word "property" creates the same problem. Indeed, the word "property" in context appears to refer to the entire hotel, casino, outside grounds, and parking lot complex. That word in hotel-industry parlance generally means just that, and employees will understand it that way. It would appear that the language of the rule has been adapted from that industry. While such broad language might be applicable to NY-NY hotel or casino em-

ployees in an appropriate rule, it is clearly too broad for the employees of a concessionaire whose employees work in a more limited but less defined area within "the property."

Aside, however, from the obvious ambiguity of the "property" or "premises" matter, the rule itself seems to have little purpose in the context of Respondent's business other than to prevent employees from communicating to each other as they change shifts. Respondent does not really present a valid business justification for the rule. It cites potential workmens' compensation concerns and a fear that an off-duty employee might interfere with one who is on duty. Both fears are overstated. If the off-duty employee is in a nonwork area such as a locker room or restaurant with other off-duty employees, the likelihood of communicating with an on-duty employee is low. If that occurs it can be dealt with on an ad hoc basis. And, its concern with an on-the-job injury workmens' compensation claim is of some concern, but not enough to warrant interference with the Section 7 rights of employees to communicate with one another. Lawyers can always visualize some incident in which an off-duty employee suffers an injury giving rise to a workmens' compensation claim, yet in reality the risk of such an injury is quite low in nonwork spaces such as dressing rooms and the seating area of restaurants. Certainly it is much lower than in the working areas.

I find that this rule is an unwarranted intrusion into the ability of employees to discuss working conditions and to engage in organizing activities with their fellow employees. It must be found to violate Section 8(a)(1) and declared invalid. *Tri-County Medical Center*, 222 NLRB 1089 (1976).

#### E. The Confidentiality Rule

Respondent's handbook, page 45, requires employees to keep certain information confidential. The General Counsel contends that the rule is overbroad and inhibits employees from discussing company matters even when away from work. The Charging Party asserts that anti-confidentiality rules are unlawful per se. Respondent counters saying that this rule is aimed at legitimate business concerns of the Company.

The rule reads as follows:

It is our policy to ensure that the operations, activities, and affairs of Ark Las Vegas and our clients are kept confidential to the greatest possible extent. If, during their employment, employees acquire confidential or proprietary information about Ark Las Vegas or its clients, such information is to be handled in strict confidence and not to be discussed. Employees are also responsible for the internal security of such information.

Clearly an employer has a substantial and legitimate interest in maintaining the confidentiality of private information—guest information, recipes, contracts with vendors, and the like. The Board very recently reconsidered this issue in response to a decision of the court of appeals for the District of Columbia, *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209 (1996). Specifically, see *Lafayette Park Hotel*, 326 NLRB 824 (1998). There, the Board said that such a rule would not be construed by employees to prohibit the discussion of wages and working conditions among themselves or with a

union. Although the language here is a little different, the analysis must be the same. This aspect of the complaint will be dismissed.

#### F. The Rules Regulating Employee Conduct

On pages 41 and 44 of the Handbook, Respondent has set forth certain rules regarding employee behavior which the General Counsel asserts are unlawful. Respondent asserts that the rules are entirely proper and designed to protect its reputation. Violation of the rules “will not be tolerated under any circumstances and will result in immediate suspension pending investigation (leading to termination) for any employee.” They are:

11. Conducting oneself unprofessionally or unethically, with the potential of damaging the reputation or a department of the Company.

68. Participating in any conduct, on or off duty, that tends to bring discredit to, or reflects adversely on, yourself, fellow associates, the Company, or its guests, or that adversely affects job performance or your ability to report to work as scheduled.

The General Counsel relies on Senior Corporate Vice President Gordon’s testimony to demonstrate the unlawful nature of the rules. First, Gordon testified Rule 11 “[W]ouldn’t be applied to union activity on its face, unless someone in union activity was doing something that was unprofessional or unethical.” He went on to explain that wearing buttons would not be regarded as a violation of the rule and neither would attending a union rally. Even so, his testimony is that although the rule would not be applied to union activity “on its face,” it might be applied if in the midst of that union activity they did something which was unprofessional or unethical. Furthermore, Gordon agreed that the Company has never seen fit to explain to employees that the rule would not be interpreted as prohibiting union activity.

Similarly, in explaining the reason for rule 68, Gordon testified: “Well, [ . . . ] it’s sometimes hard to come up with exact reasons why—what particular behavior. Like I said before, there’s—there’s all sorts of different things that can happen that might be—bring discredit to our company, bring discredit to a person who’s working for our company that’s inimical to the interest of our company and our—and the people who would—who would use our businesses, as well as their inability to perform their duties because of it, so that’s why we put the rule in there.”

Gordon didn’t say it very well, but I perceive that Respondent is concerned with the fact, like every rule maker is, that it cannot visualize every circumstance which might come up which would injure the Company’s reputation. For that reason, he says, the rule(s) must necessarily be somewhat vague.

The General Counsel asserts that the rules are overbroad and do not define what it means by “unprofessional” or “unethical” in terms of damaging the company’s reputation or somehow discrediting it. He points to such possible conduct as informational picketing (meaning, I suppose, some sort of product/service boycott) which might permissibly disparage Respondent in some fashion. It clearly is true that public criticism of an employer’s treatment of employees (“pays substandard

wages,” “abusive work practices,” “unfair”) are protected by § 7 and an employer who disciplines an employee for participating in such criticism will run afoul of Section 8(a)(3) and (1). Indeed, most employers are sensitive to public airing of dirty laundry. Yet that airing is protected by Section 7 so long as the employees do not cross the bounds of “disloyalty” such as product disparagement. *Cincinnati Suburban Press*, 289 NLRB 966 (1988); cf., *Community Hospital of Roanoke Valley*, 220 NLRB 217 (1975), *enfd.* 538 F.2d 607 (4th Cir. 1976).

In *Electrical Workers (Jefferson Standard Broadcasting Co.) v. NLRB*, 346 U.S. 464 (1953), the Supreme Court upheld the Board’s determination that product disparagement which amounted to disloyalty was good cause for discharge even where the employees were also engaged in a labor dispute and were using product disparagement as a tactic in that dispute.

In that context, Gordon’s explanation of the rule and the manner in which he intends to use it, does not seem out of line. He appears to recognize that the rule is not to be applied in labor disputes, even if that is not an expressly stated exception. What the rule does do, however, is incorporate the Supreme Court’s *Jefferson Standard* interpretation of just cause. In other words, if as Gordon says, an employee involved in otherwise protected Section 7 conduct is also perceived to be engaged in conduct which is not protected (product disparagement relating to the work of the departments or fellow employees) then it intends to discharge such an employee as would be its right under Section 10(c). The pertinent portion of Section 10(c) is set forth in the footnote.<sup>5</sup>

The General Counsel’s difficulty with both rules, however, is that neither they, nor the introductory portion of the rules, expressly exclude protected conduct from its reach, thereby in his opinion, allowing for an ambiguity permitting an interpretation so broad as to prohibit the type of conduct which would normally be protected in a labor relations context.

While I can see some validity in the argument, indeed I have found ambiguity unlawful, in discussing another rule, *supra*, I am not as impressed here. First the rule appears to be aimed at conduct not related to Section 7 activity. Instead it seems to be related to crimes or other misconduct, such as giving proprietary information to competitors. That is a legitimate purpose of the rule. Second, the statute specifically permits discharge for certain conduct committed by employees in the context of labor disputes, if that discharge is for cause. And, the Supreme Court has defined the limits of such conduct and the rule may be properly invoked in such an instance. The real question is whether any employee, guided by knowledgeable union officials, would harbor uncertainty over the scope of the rule. I tend to doubt that there would be any uncertainty here. The Union is undoubtedly well aware of the limits of protected conduct and well aware that the Act permits conduct which could damage an employer’s reputation insofar as employee treatment is concerned. It won’t interpret the rule as having any application to a labor dispute.

<sup>5</sup> Sec. 10(c) (in pertinent part): “No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.”



Moreover, *Lafayette Park Hotel*, supra, addresses an almost identical rule, finding it to be lawful. It said such a rule cannot reasonably be construed as encompassing Section 7 activity. I therefore find the maintenance of this rule to be lawful.

*G. Conduct Alleged to Violate 8(a)(1) or 8(a)(3) of the Act*

Although this section is devoted to allegations that Respondent has violated Section 8(a)(1) or 8(a)(3) in stand-alone incidents, several such allegations have already been discussed. Specifically, the button-related events described in section II.B involving employees Saam Naghdi, Ron Isomura, Randy Kiddy, Sandra Jordan, and Clara Montaño. That discussion will not be repeated here. There are, however, numerous other matters alleged in the complaint. For the most part the incidents are discrete, having little direct relationship to one another, although button wearing is a common thread. Accordingly, each incident will be dealt with separately by employee.

1. Ron Isomura

Ron Isomura has been discussed to some extent above when he was discharged for distributing union material in the locker room on March 13. In levying that discipline I found Respondent to have violated Section 8(a)(1) and (3). It will be recalled that Isomura had signed the letter of March 11 and daily wore the union committee leader button. He was a prep cook in America, supervised by DeFazio and two sous chefs.

He was reinstated by Gordon when he realized that the rule had been misapplied by Conn and the other managers (DeFazio and Savoy) who had become involved. Before the incident occurred, according to DeFazio, Isomura was already at risk. He was still in his 90-day introductory period and, according to DeFazio, would have been discharged that day anyway for failing to meet the requirements imposed upon him. He says he had decided to discharge Isomura for that reason as early as March 9.

When Isomura returned to work a week later, Savoy gave him a “mini-orientation” as he had not gone through the procedure during his initial hire. He says Savoy told him the “timing” of the discharge had been wrong and asked why the Union was spreading “propaganda” about Ark. He also asked how Ark could afford to pay the union-negotiated wages which appeared in a flyer. Then he went on to point out that the handbook still prohibited Isomura from coming in more than 30 minutes early and that he could not stay for more than 30 minutes after his shift. In addition, Savoy told him that he could not organize in the EDR at all.

The two argued about whether those restrictions were lawful. Isomura told him the NLRB had said he could and he said the company attorneys disagreed. He asked Isomura to wait until Wednesday while he checked further.

On Wednesday, McEvoy and Savoy called him to DeFazio’s office where Savoy, alluding to what might be a “gray matter” [area], told Isomura that the company’s attorney had contacted the “Labor Board.” Isomura’s testimony: “He [Savoy] told me he contacted [an] ARK attorney. An ARK attorney told him that he contacted [the] Labor Board, and the Labor Board said that the—the handbook is legal about coming in only 30 min-

utes. I can’t come in one hour. And I cannot do no organizing in EDR.”

Savoy testified only that he had asked Gordon to check on the matter, was informed that he had, and then told Isomura only that it was still company policy to bar organizing in the EDR. He did not testify that he said anything to Isomura about the 30-minute rule.

About 3 weeks later, on April 16, DeFazio issued Isomura a warning for leaving breaded chicken tenders out the night before. He agrees that he left them out, but says he had been working past his shift and the graveyard prep cook (Marco) had said he would finish them. Isomura also says he had been unable to find chef Perez to tell him, so he had told the lead prep, Rickey Takaya, about it and he had told Isomura to leave it.

On the bottom of the warning form, Isomura asserted that this warning was “conspicuous harassment” and Takaya had been informed. Indeed, DeFazio admits he has never asked “chef Rickey” if he knew about the tenders. The warning stood. Takaya was not called to testify.

Respondent defends on the ground that this was not the first time that Isomura had left food unrefrigerated, pointing to some earlier incidents before his March discharge/reinstatement and which had supposedly led DeFazio to make his March 9 decision to discharge him. I am unimpressed. The incident, while annoying, was relatively harmless. Moreover, DeFazio would not hear Isomura’s explanation, that Takaya knew of it and had told him to go home because it was past his shift and that Takaya would handle it. Isomura was already in DeFazio’s doghouse and DeFazio, overruled once on Isomura’s discharge, was too eager to make a record for a subsequent discharge. He was present when Isomura had returned to work and was involved in Savoy’s charge that he refrain from organizing in the EDR and to abide by the 30-minute rule. The managers well knew of Isomura’s propensity toward organizing and were looking for an excuse or creating a paper trail which would justify getting rid of him. Respondent’s explanation is simply too weak to be of concern.

Clearly Respondent has committed several independent violations with respect to Isomura. On March 22, Savoy’s so-called miniorientation breached the Act in several ways. He barred Isomura from lawful organizing both by prohibiting it in the EDR and by requiring him to abide by the 30-minute rule. Both directives violated Section 8(a)(1). In addition, his supposed rhetorical questions about why the Union was spreading propaganda about the Company and about Respondent’s ability to match the union-negotiated wage scale set forth in a flyer were, if not an actual interrogation, an “in your face” act of intimidation. It was no rational discussion or debate, but an unwarranted demand that Isomura answer a question which he had no capability to intelligently answer and Savoy knew it. Answering the question was not the issue. Putting Isomura on an uncomfortable spot was. The conduct violated Section 8(a)(1) as a direct coercion of Isomura because of the views he held.

Finally, Savoy is not credited with respect to his description of what was said several days after Isomura returned to work following his reinstatement when he told Isomura the rule against distribution/solicitation in the EDR and the 30-minute

rule were proper and lawful. It is true that he punctuated that directive by asserting that the "Labor Board" had confirmed to Respondent that its rules were lawful. That statement was untrue. The National Labor Relations Board had not yet been asked to review the rules, much less determine their legality. Moreover, there is no evidence that any of the Board's Regional Office people had said any such thing. In fact, Savoy (or someone upon whom Savoy relied) was making it all up. Thus the directive's only purpose was to interfere with Isomura's Section 7 right to organize. It effectively prevented him from organizing before or after his shift and in the EDR. The fact that Respondent improperly invoked the Board's name does not add anything to the unlawful interference.

The General Counsel argues that Respondent's use of the Board's name in asserting its misstated claim of legality requires me to make an additional finding that Respondent violated Section 8(a)(1). The General Counsel cites no unfair labor practice case on point and I am disinclined to make such a finding.<sup>6</sup> The remedy requiring Respondent to eliminate the rules will be sufficient to correct the real problem, maintenance of the rules.

## 2. Michael Thomasson

Michael Thomasson was hired in December 1996 as a waiter for America. He worked the swing shift, which varied slightly, either 4 or 5 p.m. to 11 p.m. or midnight. At the end of March he began wearing the "union committee leader" button daily.

The first night he wore it, March 31, he says his manager Margeaux Farris, gave him a "cut" signal at 8 p.m., 3 hours before the scheduled end of his shift (11 p.m.), and sent him home for the evening. Respondent uses a master clock-in, clock-out system known as Kronos. It records each employee's entrance or exit from work when they swipe their magnetic ID cards through a sensor. The Kronos system shows that on March 31, Thomasson checked out at 11:30 p.m., 30 minutes past his scheduled time if it was 11 p.m., or 30 minutes early if his shift was to end at midnight. As the documentation shows that he worked to about when he should have, I find that his testimony about March 31 to have been in error. The allegation that he had been sent home 3 hours early because he wore his union pin for the first time that night will be dismissed for lack of evidence.

<sup>6</sup> The Board has held in two areas that it is a violation of Sec. 8(a)(1) to deliberately misstate legal rights under Sec. 7. The most common is a misstatement of economic strikers' rights under *Laidlaw Corp.*, 171 NLRB 1366, enf'd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). If that misstatement amounts to a threat of job loss, an 8(a)(1) violation will be found. See *Edward A. Utlaut Memorial Hospital*, 249 NLRB 1153, 1157-1158 (1980), enf'd. in part, denied in part w/o opinion, 657 F.2d 272 (7th Cir. 1981); *Emerson Electric*, 287 NLRB 1065, 1066 (1988); and *Baddour, Inc.*, 303 NLRB 275 (1991). The other is sometimes found in representation election campaigns where an employer misstates employee rights as described in Sec. 9(a) of the Act, by wrongfully telling employees that they will lose a benefit of employment, the right to speak directly to the employer if a third party is injected into the relationship. See *Sacramento Clinical Laboratory*, 242 NLRB 944 (1979); *C & J Mfg. Co.*, 238 NLRB 1388 (1978); and *Handee-Pak, Inc.*, 232 NLRB 454 (1977).

The complaint also asserts that Bobbie Rihel and Farris issued Thomasson a warning on April 5 which was unwarranted and that it was because he was wearing a pin. The warning was for failing to approach customers within 15 minutes of their sitting down at two tables in his station. On the stand he at first denied that the incident had occurred at all. When presented with the warning, he admitted that he had written in the comments section that he did not approach them for about 7 minutes.

It is clear from the evidence that the customers were both hot under the collar and Rihel was responding to their anger. Whether it was 7 or 15 minutes is of little significance. Even if he was wearing his union button during the incident, no manager mentioned it and the focus was entirely on the occurrence, nothing else. In that circumstance I see little support for the allegation. It, too, will be dismissed.

## 3. Yvonne Spears

Yvonne Spears is a server in GYG. She was hired in December about a month before NY-NY opened in January. She testified that on April 3, at the end of her shift and while she was getting ready to turn in her "bank," Manager Christine Flores and Assistant Manager Philip Mathews approached her.

Flores began by refuting some "rumors," which she said were being circulated, to the effect that because of the union organizing effort, some 35 executives were to be fired. Flores assured Spears that was not so. Spears replied that the rumor she had heard was that it was to be 35 employees, and she paid little attention to such rumors. Then, according to Spears, Flores "told me that—'they' meaning ARK, had no intentions of signing a union contract. And I told her I knew that too."

Flores could recall only one conversation with Spears regarding the Union. She recalls Spears asking for her opinion about the Union. Flores says she simply told Spears she didn't think Respondent could afford the union contract rate. She explained to me that she had come to this belief because Respondent wasn't a casino and didn't have casino dollars to subsidize the pay scale. However, there is no evidence that she actually explained her reasoning to Spears.

Even so, I am unconvinced that Flores actually said anything about refusing to sign "a" union contract. I find that she actually said the company couldn't afford to pay the rate set forth in some union flyers. Thus, I do not think the evidence supports a finding that Flores said anything to the effect that unionization was futile as alleged in the complaint. Instead it supports a slightly different violation, that Respondent could not afford to pay the rates which the Union wanted. The Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), dealt with that issue. It said in a labor relations context that the analytical question was whether the remark was a threat or a "fact-based" prediction, which would be lawful as an expression of opinion. At 617-619.

For this remark to have been a lawfully fact-based prediction, Flores would have had to have stated her reasoning to Spears. She did to me, but not to Spears. Thus Spears was left wondering why Flores had put it the way she did. One reasonable interpretation is that if Respondent was obligated to sign that contract, and if it could not afford the pay rates, something

negative would occur—perhaps loss of jobs or losing the business to economic circumstances. Without an objective explanation, that becomes an unlawful though subtle, threat. *Gissel Packing Co.*, supra, at 618; *Jimmy-Richard Co.*, 210 NLRB 802, 804–805 (1974), enfd. sub nom. *Amalgamated Clothing Workers v. NLRB*, 527 F.2d 803 (D.C. Cir. 1975), cert. denied 426 U.S. 907 (1976). Also, *Weather Tamer*, 253 NLRB 293, 305 (1980), enfd. in pertinent part 676 F.2d 483 (11th Cir. 1982) and many others.

Therefore, I reach a conclusion different from the one offered by the complaint, but based upon the same facts. An appropriate remedial order will be issued.

#### 4. Sandra Lopez

Sandra Lopez was hired in early December 1996 to be a server in America. She began working when NY-NY opened. She signed the March 11 letter demanding recognition and asserting that she was a union leader. On March 14 she began wearing the “union committee leader button.” She asserts that on that day or shortly thereafter, Supervisor Farris “cut” her at 8 p.m., 3 hours before the end of her shift. The Kronos time-keeping system does not support her. On March 13, the day before she began wearing the button, she was sent home at 9:26 p.m., about 90 minutes early.<sup>7</sup> On March 20 she was “cut” 40 minutes early; on March 28 “cut” at 9:15 p.m., an hour and 45 minutes early; and on March 30 and 31, “cut” 30 minutes early. There is no evidence that she was ever “cut” by 3 hours.

Farris testified, and there is no reason to doubt her, that early outs are relatively common and are based upon the amount of business being done that evening. The restaurant is shut down by stages, closing the outer wings first. When an area is shut down, the server is usually cut, although since the manager attempts to equalize the cuts, sometimes that server will be moved to an interior station and the person at that station will be cut. Lopez agreed that on the night she is concerned about, several other servers were also sent home early. She also testified that a server named Sokolowski took over her station. Moreover, a review of the Kronos records shows that early outs were common.

I am of the view that this allegation is not supported by the evidence. The theory of the General Counsel is that Lopez suffered an early out as soon as she began wearing her union committee leader pin and that she was somehow treated differently from other servers with respect to the “early outs.” First, there is no evidence of any 3-hour “cut.” Second, the lengthy cut in the mid-March period to which she refers is before she began wearing the button (although after she had signed the letter). And, third, the lengthy March 28 early out is not within the timeframe she testified about. In short, the incident does not appear to have occurred as she recalls. Finally, given the everyday nature of the early out practice, and the fact that it was applied to all the servers, I cannot find any evidence of a violation here.

<sup>7</sup> There is also a 4:15 p.m. departure on March 19, but that seems to be something else, either a different shift or a special reason for leaving early.

The complaint also asserts that Lopez received unwarranted discipline relating to supposed inattentiveness to customers, an April 5 counseling review and a 3-day suspension on April 12.

The first incident involved not refilling customers’ beverages while the customers waited for their food, which had been delayed at the kitchen. The customers had apparently complained to Farris and Farris had seen that their beverages were refilled. Lopez says she explained to Farris later that the customers had told her not to refill them until the food was served. Farris did not accept that explanation and, frankly, neither do I. If they had said any such thing, they would not have complained to a manager to get the situation rectified. Assuming Lopez is telling the truth, it seems likely that she has mistaken one table for another.

The second incident, about a week later, was for “poor customer service.” The suspension notice asserts that after a customer’s 25-minute wait she had failed to bring drinks and had not provided bread for the table. Lopez says the customer was a mother with small children who had asked for paper cups with lids. She says she searched all over for them but was unable to find them quickly enough to satisfy the customer. Eventually another server found them. Manager Bobbie Rihel placed another server at that table and issued the 3-day suspension to Lopez.

I am unable to find any violation with respect to these incidents. The entire matter seems to be a relatively even-handed processing of progressive discipline. It began with a counseling review in the first matter and a short suspension for the second. Now it may well be that Lopez’ view of the difficulties she was encountering on those days is not unreasonable. Other employers may well have responded with no or less discipline. Yet the General Counsel must connect the discipline to Lopez’ union activities in order to make out a violation. That has not been accomplished. Neither Lopez’ button nor her having signed the letter was ever mentioned to her by any manager. And the incidents did occur and did come to the restaurant managers’ attention. Customers were unhappy with the service and something needed to be done to correct the shortcoming. Choosing a progressive discipline to accomplish that is not evidence of discrimination. These two allegations will be dismissed as well.

#### 5. Saam Naghdi

Saam Naghdi’s March experience with button wearing has been described above. He had been sent home by GYG manager, Christina Flores, for wearing the button. On April 10 she issued him another warning, this time for failing to refill salt/pepper shakers. It was a slow afternoon and he had been training a new hire. At the end of a shift each server is supposed to perform this so-called “side work” before checking out. The checkout process is performed by the manager, in this case Flores. Flores did check Naghdi and his trainee out. Several hours later she observed the server who was working the next shift filling up the shakers and the sugar caddies. Flores concluded that Naghdi hadn’t done the work, even though she had approved his departure. The next day she issued him a warning, but declined to deliver it herself. Instead she asked her Assistant Manager Sullivan to deliver it.

The warning, over such a petty matter, triggered Naghdi's comments: "Good Joke. Ha Ha. I find it really funny that the GM signs me out and okays my side job and then she writes me up. Hmmn. Maybe the GM should be trained on the side jobs. Sounds like a nice Ark conspiracy to me. Hmmn."

His comments caused Vice President Gordon some concern. He met with both and eventually determined that Flores was not performing well as the GYG manager. She was transferred to the beverage director position. Even so, the warning stood.

As I see it, Flores was still sensitive to the rebuff she had received from the position Naghdi had taken regarding the button in early March. Her decision to send him home had been reversed by upper management and she no doubt resented the embarrassment Naghdi had caused her. The warning over the salt and pepper shakers was simply her petty act of revenge. As can be seen from Naghdi's reaction, he perceived it as a poorly conceived antiunion conspiracy. He was, and is, an expert server who does a good job, and he knows it. He could see no other motive than to sting him for his union views.

I think his perception was generally correct. Flores may not have been involved in any "Ark conspiracy" but she was still bruised over the earlier incident. The warning was an easy way to get even. Since it all arose from the earlier incident, the entire warning process was poisoned. Had Gordon stricken the warning as unwarranted, perhaps Respondent's defense that this was simply a disagreement with Flores' management style might be persuasive. He did not and I am left with a petty revenge matter intertwined with an earlier protected act.

In that circumstance, I find that the warning issued to Naghdi was in retaliation for his union activities. A remedial order under Section 8(a)(1) will be entered.

#### 6. Vertis Manuel

Vertis Manuel was hired January 3 as server for America. He signed the March 11 letter and began wearing a union committee leader pin shortly after they became available. Evidence elsewhere shows they became available about March 13; he thinks he began wearing his on March 8. I think he is mistaken here, but the mistake is insignificant.

The evening of April 8 was a nightmare at America. The restaurant was unprepared for a large number of conventioners and the kitchen was running about 2 hours behind. Very little was going right. Angry customers were everywhere; many were leaving. To placate the customers, management had begun "comping" drinks (giving free or "complimentary" alcoholic beverages) to the customers who wanted them. The wait staff had little to do because of the kitchen delays.

Manuel and management have two versions of what happened next.

Manuel testified that he had two booths near the back next to the bar. Next to his tables were two others, being handled by fellow server Beth Hammontree. They were the only two waiters in the area. Both were wearing wait staff uniforms; it is distinctive and one would not mistake it for supervisors' attire. At one point a lady approached Manuel near the bar and asked to speak to a manager. Manuel asked where she was sitting and went off to get a manager; he found Assistant Manager Joe

Albanese. Manuel let him take care of the problem and resumed his duties.

For a period of time Hammontree was absent from her area and while she was gone Manuel attempted to conciliate some customers at her station who were complaining bitterly. He apologized to them and noticed that one of the women was the lady whom he had seen at the bar. He testified:

MANUEL: . . . [A]fter I apologized for the bad service that we were giving, she said, 'Well, what I'm going to do is that when I leave, I'm not going to pay my check.'

Q. And what did you say?

A. I explained to her that that's an issue she would have to take up with management. And she explained to me that, no, when I leave the hotel, I'll refuse to pay. And I asked her, I said, "Are you staying at New York, New York?" And she said, "Yes." And I explained to her that's who she should be complaining to.<sup>8</sup>

He says about 40 minutes later another lady came up behind him and spun him around, saying he had told her to complain to NY-NY. At that point manager Seth Lewis intervened and said he would take it from there.

Executive Chef Damien McEvoy says he was in the kitchen when he heard Lewis say there had been an "altercation" between Manuel and some guests in the dining room. He instructed Lewis to get written statements describing what had happened. He also says the decision to discharge Manuel was made by Lewis and Gordon and that he was not involved.

The customer's identity is apparently not known. Respondent has presented the testimony of several individuals. According to Respondent, Manuel was behaving in a manner consistent with what it characterizes as the Union's opposition to strip hotels hiring outside restaurant operators instead of operating them themselves.<sup>9</sup>

Manuel, of course, admits that he told the customer to take her complaint to NY-NY, as she was a NY-NY hotel guest in the belief that the bill would not be presented for payment until she checked out. Even so, his testimony falls far short of sending the guest to NY-NY simply to cause trouble.

Derek Stoffel was another waiter (now bartender) in America. He says he had a station near Manuel's that night. He testified that he heard both Manuel and another server, Donna Wilson, tell customers to go out to the NY-NY representatives and report that they weren't getting good service. He also asserts that he spoke to Manuel after the incident to ask what was happening. He says Manuel told him he had been telling customers to complain to NY-NY and urged Stoffel to do the same. Stoffel says he advised both Lewis and Albanese what they were doing. Stoffel is Albanese's roommate.

<sup>8</sup> Manuel asserts this is the only time he ever told a customer to complain to NY-NY.

<sup>9</sup> Manuel admits wearing a "no subcontracting" shirt at some union rallies. He has been a union member since 1995. At the time of the hearing Manuel had become employed by the Union in a capacity which Respondent chose not to pursue when examining union organizer Kline. Neither was Manuel's length of employment explored.

Wilson did admit that she was telling customers that night to complain to NY-NY management about the service in order "to help us" in their effort to organize.

Although from Respondent's perspective, both Manuel and Wilson had said roughly the same thing to customers, only Manuel suffered any discipline. He was discharged, apparently because whatever he said had actually been transmitted in some form (perhaps garbled) to NY-NY.

In that regard, NY-NY front office Assistant Manager Carrie Spiropoulos testified that a woman had come to the NY-NY front desk saying that a manager from America had told her to complain to NY-NY about the poor service. Following up, though somewhat perplexed by the claim, she accompanied the lady to the America floor where she pointed to two persons (neither of whom were managers), one Caucasian and one African-American. The lady went to her booth which had about 15 others sitting there. At that point the African-American<sup>10</sup> appeared at the table and the woman said to him, "Aren't you the manager who told me to go and get the hotel manager?" Spiropoulos said he smiled strangely, "[L]ike, I don't know, cat that ate the canary kind of look, strange look. And he just shook his head no." She went on to say that at that point the lady "[L]ost it. She like started jumping up and down. And she ran over to her table. And she said, 'Didn't he say he was the ho—didn't he say he was the manager,' and she—and all the people in the booth were like looking at her like she had lost her mind. But she was so mad . . ."

With respect to Spiropoulos' testimony that the African-American looked like the cat that ate the canary, I am of the opinion that her characterization of such a look is too vague and conclusionary to be relied upon. Respondent views it as an admission of guilt with respect to motive, but I do not think it convincing. People smile for all sorts of reasons, including amused bewilderment. In this case the lady was making a rather wild accusation, that Manuel, wearing a waiter's uniform and performing waiter's duties, had passed himself off as some sort of manager. A waiter hearing the accusation, coming from an exasperated customer, could easily smile in that situation, particularly if her companions were treating her as if she didn't know what she was talking about.

This last issue, supposedly passing himself off as a manager, appears in the record of exit interview as the first and second items (they are intertwined) which Lewis told Manuel when explaining the discharge. (GC Exh. 43.) The document asserts that Manuel had visited a table not his own not for the purpose of serving it and appeared to the guest to be a manager.

Objectively, no such thing ever happened. Spiropoulos' testimony made that clear. She said the lady's companions were looking at her as if she had lost her mind, and while her behavior may have had something to do with it, all could see Manuel wearing his waiter's uniform knowing he had said no such thing. Beyond that, as he was wearing the uniform, the probability that he had he would have attempted to have impersonated a manager is so unlikely as to be disbelieved on its face.

Yet the one thing which Lewis never did in the course of his "investigation" was to ask Manuel what had happened. He did

not do so that night and he did not do so during the exit interview 2 days later.

Instead, Lewis characterized the incident as a "confrontation with a customer" according to McEvoy and suspended Manuel for 3 days "pending investigation." While the investigation appears to have focused on Manuel's having directed the customer to complain to NY-NY, when Lewis heard that evidence, he stopped. At that point the decision had been made. His testimony in answer to my questions was entirely unsatisfactory. His testimony about the exit interview on April 10:

JUDGE KENNEDY: Mr. Lewis, I'm interested in your conversation during the discharge of Mr. Manuel. You had, at that time, received information from several other individuals, I think, who had given a version of what happened out there. What—and then Mr. Manuel, you said, told you that that wasn't the way it happened. What did you do at that point?

THE WITNESS: Uh—he—I asked him if he had any further comments about it. He said "No."

JUDGE KENNEDY: Well, if it wasn't the way it happened, and you had different versions in writing, why didn't you ask Mr. Manuel to explain his version, and perhaps put it in writing—

THE WITNESS: Asking him to explain his version, I—

JUDGE KENNEDY: —or describe it?

THE WITNESS: He didn't volunteer any more information.

JUDGE KENNEDY: Well sir, I—

THE WITNESS: I—I sat there, ready to listen.

JUDGE KENNEDY: But you had asked, apparently, other people to volunteer to give statements, why didn't you ask him?

THE WITNESS: I sat there ready to listen to any other version he was ready to—he chose not to.

JUDGE KENNEDY: But you didn't—

THE WITNESS: He chose not to.

JUDGE KENNEDY: But you—well did you encourage him to give a statement?

THE WITNESS: Uh—I didn't discourage him.

As a result of that approach, Respondent deliberately blinded itself to a more probable version, one which would have been presented by the person actually involved in the incident, carrying firsthand information, as opposed to the secondhand material supplied by the others. Even if, as asserted by Stoffel, Manuel had been telling customers to complain to NY-NY, it does not follow that he did so in this incident. He says he only told the customer to take up the billing question with NY-NY, based upon what the customer had told him. Thus, Stoffel's version really adds nothing; in fact it may have distorted the situation.<sup>11</sup>

<sup>11</sup> Hammontree's testimony about what a customer later told her about what Manuel had done is clearly secondhand. She never saw or heard Manuel speaking to customers that night. Furthermore, her observation of a lady customer with an American Express credit card is of little assistance to counter Manuel's testimony regarding the woman's intentions regarding paying her bill. She never used it as the meal was

<sup>10</sup> Manuel is African-American.

On the personnel action form (GC Exh. 18) Respondent asserts that the reason for the discharge was “conduct unprofessional—damaging to business—willful misconduct.” Vice President Gordon concurs, even citing rule 68, discussed supra in section II.F. That rule bars behavior which supposedly “tends to bring discredit to, or reflects adversely on, yourself, fellow associates, [or] the Company.”

There is no evidence that NY-NY ever complained about Manuel’s conduct that night and it seems likely that upper NY-NY management, if they even heard of the incident, regarded the matter as a minor misunderstanding. Moreover, if it happened as Manuel testified, and I believe it did, it didn’t even tend to bring discredit on himself or any fellow associates. It was only a well intentioned effort which went badly due to some sort of misperception on the part of a disgruntled, perhaps mildly inebriated, customer. In short, the rule was not broken.

There is also evidence that the day before he was discharged a local newspaper, the Las Vegas Review Journal published an article headlined “Foodworkers Hope To Organize Casino Sub-contractor.” The article stated: “Vertis Manuel wants affordable health insurance.” It went on to describe the organizing efforts.

Thus, the evidence shows that Respondent harbors union animus, was aware that Manuel had signed the March 11 letter, wore a pin declaring him to be a union committee leader, was mentioned in a newspaper article as a union activist, and fired him for reasons which it cannot demonstrate are true, for Lewis deliberately chose to ignore Manuel’s versions of the facts when investigating. In this regard Respondent failed to do what it promised on page 46 of its handbook, “fully investigate the facts surrounding the incident(s) for which discipline is being considered.” That suggests strongly that Respondent was using the incident as an excuse to rid itself of Manuel who was otherwise a satisfactory employee. Clearly such an effort fails to rebut the prima facie case that Manuel was discharged in violation of Section 8(a)(3). Therefore I find that Respondent unlawfully discharged Manuel on April 10.

#### 7. Jesús Araiza

Jesús Araiza was a dishwasher at America who normally worked a 2–10 p.m. shift. He had been hired on February 20. On March 13 he witnessed the confrontation between Isomura and the managers who were attempting to prevent Isomura from distributing union material in the locker room. Araiza was the one to whom Isomura was seeking to distribute. Unfortunately, Araiza was running about 20 minutes late; one of the supervisors knew it and told him to get to work and it is unclear whether the distribution was ever completed. Araiza’s attendance and tardy record between his hire and his discharge on June 10 was somewhat spotty. He did sign the March 11 letter and wore the “committee leader” union button to work.

“comped” and it is not even clear that it was the same person. Furthermore, presentation of a credit card would not have occurred before the meal was served. Manuel had gone to Hammontree’s table to assuage the concerns of customers who were waiting for their meal. The timing is wrong to support a finding that Manuel was not telling the truth.

The General Counsel alleges that Respondent’s discharge of Araiza violated Section 8(a)(3). Respondent replies that he was discharged for failing to satisfactorily complete the 90-day introductory period.

On Tuesday, June 9, Araiza was scheduled to work at 2 p.m. as usual. However, he had been in California for a day or two. At approximately 9 a.m. while he was driving back to Las Vegas, his car broke down 20 miles outside Victorville, California, which is about 190 miles from Las Vegas. He was able to get a ride to Victorville where he attempted to telephone his cousin in San Bernardino (about 43 miles southwest). He was unable to reach his cousin until 2 p.m. Eventually, Araiza arrived at work in Las Vegas about 6 p.m.

He testified that while in Victorville, he called his cousin’s home frequently, but could not reach him because the cousin was at work. At the same time he admits that he never attempted to telephone Respondent to advise them of his predicament. He claims, lamely in my opinion, that he didn’t have the telephone number for absences so he didn’t call. He admits he did not seek to find any other number to call either. There were several obvious ones. He could have tried directory assistance for Respondent or for NY-NY. Had he called the NY-NY main number the call could have been transferred to his department head, Valerio Rodriguez, or to the Ark administrative office. He had several numbers to call, but made no effort.

When he arrived at the facility he was prevented from working by two supervisors whose names he doesn’t know. (They were McEvoy and Savoy.) He had attempted to log in at a NY-NY terminal instead of Respondent’s terminal which is conveniently located outside the locker room. That behavior had drawn the attention of the two executive chefs. After speaking to another chef outside his presence, he says they took him to the office to get him a payroll check. Unable to find it, they told him to come back the next day, April 10. When he did so, Rodriguez told him he had been fired and gave him his final paycheck. McEvoy says they simply sent him home as they would not permit anyone to begin work 4 hours late.

The personnel action notice placed in his file shows that the effective date of his discharge was the day before, April 9, the day he had been about 4 hours late. The reason given was that he had failed to meet the 90-day introductory period.<sup>12</sup> The form was signed by McEvoy. McEvoy asserts that the reason he was fired was because of the lateness on April 9.

Respondent does have a very tough absence policy when it comes to no-call, no-shows. Clearly Araiza breached that policy and was seemingly attempting to provide an excuse for himself when he tried signing in at the NY-NY clock.

If the evidence stopped there, his case would be less troubling. But Respondent has made other assertions as well. It contends, in a letter from its counsel that Araiza was “habitually” late as a probationary employee (GC Exh. 10, p. 5), and that he was one of five employees laid off in a near simultaneous cancellation of the swing-shift room service operation.

<sup>12</sup> Respondent’s policy with respect to discharging 90-day introductory employees is to decline to provide such individuals with the real reason for their failure. Those persons are told only that they have failed the 90-day introductory or “probationary” period.

Respondent no longer makes the latter argument as the evidence dealing with it would not support it. Frankly, I am of the belief that counsel simply made an unfortunate error with regard to that contention and that it is not evidence of shifting reasons. Still, the evidence regarding his "habitual" tardiness is not as strong as one would expect. Certainly Araiza's limited admission that he was only absent once is not worthy of much consideration. There are two entries in the logbooks showing tardies on March 14 and 15. We also know of the March 13 tardy when he encountered Isomura, for he acknowledged that he was then 20 minutes late. Moreover, executive steward Kenneth Clark said he counseled Araiza verbally three times regarding lateness. Assuming two of those counselings were the logged versions, there clearly are others. Even so, given the passage of time between the March tardies and the April 10 discharge, the attorney's use of the phrase "habitual" is an overstatement.

The General Counsel in this situation makes a timing argument. He points to McEvoy's signature dated April 9 and concludes that the decision to discharge Araiza was made before the 4-hour tardy was known and that the only tardies were ancient history and thus the reason is false (particularly when tied to the room service division's swing-shift shutdown). The only evidence that a decision to discharge him before the 4-hour tardy is the odd treatment which Araiza describes after being caught by McEvoy and Savoy. He says they took him to get what might be construed as an already prepared paycheck, suggesting the decision to discharge had previously been made. Yet McEvoy says he simply told Araiza he could not go to work if he was 4 hours late and sent him home. McEvoy's version makes more sense to me. Accordingly, it is credited.

Based on the credible evidence, I conclude that the General Counsel's *prima facie* case with respect to Araiza, weak as it is, has been rebutted. McEvoy's statement that he discharged Araiza after finding out that he was 4 hours late, and for which Araiza had only a lame excuse,<sup>13</sup> while observing Araiza attempt to avoid responsibility by deliberately (if futilely) punching the wrong clock, is entirely credible. Araiza had been caught by the supervisors least likely to have cut him any slack. Accordingly, I find that the General Counsel has failed to prove that Respondent discharged Araiza because of his union activities. This portion of the complaint will be dismissed.

#### 8. Jorge Aguilar and David Schafer

The complaint asserts that both fry cook Jorge Aguilar and line cook David Schafer were discharged in violation of Section 8(a)(3) because of their union activities. Respondent asserts that both were laid off for lack of work when it eliminated the swing shift in its room service division, effective April 10. It also says it tried to place these individuals in other restaurants and the banquet operation, but when it was unable to do so, it let them go. Schafer later answered an ad for a cook, but was given a runaround.

<sup>13</sup> Araiza had said only that he "had been in L.A." and never described the vehicle breakdown. If he had, his failure to call would have made his excuse even more inadequate.

Jorge Aguilar worked the day shift at America, 7 a.m. to 3 p.m. He had been hired on January 22. Aguilar is a long time Ark employee having worked for other divisions on the East coast, including New York City, Washington, D.C., and Tyson's Corner, Virginia. The manager at Tyson's Corner had given him a very strong general recommendation dated August 7, 1996.

In March, Aguilar began wearing a union committee member button. On April 10, his immediate supervisor, sous chef Robert DeFazio, called him to the office and discharged him for "not having passed his 90 day introductory period." He offered no other explanation. The only feedback Aguilar had gotten thus far was a compliment from another chef, named Jeff, to the effect that he was doing good work. The parties are agreed that he had never been assigned to perform work for the room service division.

David Schafer, on the other hand, did work for the room service division. He had been hired in early December as a line cook for the 2–10 p.m. (swing) shift. His supervisor was chef John Hausdorf. He was one of the two original line cooks hired for the swing shift. (The other was Skyler Barnhill.) Then in January, two more line cooks were brought in, Manoune "Cala" Dengvongsa and Vincent Shelby. There were also pantry employees and persons who primarily did banquet work (usually cold hors d'oeuvres and aspics) but who were considered part of room service.

In mid-March Schafer began wearing a union button daily. Before he put it on he spoke to chef Hausdorf about it and explained he had the right to wear it. Hausdorf apparently was not unreceptive and told Schafer to "go for it."

On April 12, Hausdorf came to Schafer while he was working and said, "Dave, you know what's going on here. I'm sorry[.] I have to let you go. I've tried to place you into another restaurant, but nobody will have you." He said he was sorry to let Schafer go, that he was a good worker, but there was nothing he could do about it. Schafer was laid off while the other three line cooks were kept on, transferred to other restaurants.

Schafer is an experienced cook with 13 years' experience at another Las Vegas Hotel, the Imperial Palace. While with Respondent he was used to training new employees. In addition he has owned a restaurant back East and he has managed restaurants in Las Vegas prior to his stint at the Imperial Palace.

Of the 10 swing-shift room service employees, 4 were laid off. Barnhill went to Gallagher's, while Dengvongsa and Shelby went to America. According to McEvoy, the chefs in those locations requested them. He says there were no requests for Schafer, sauté cook Derrick Thompson, and another employee, Deborah Jackson. Those were the four who were laid off. Those who had banquet skills were kept in that capacity.

In August, Schafer answered a newspaper ad which Respondent had run seeking cooks. He describes what happened when he went to the Harmon Avenue hiring office:

I walked into the office, straight ahead to the receptionist, and told her that I was formerly employed by ARK. If—I got laid off for reduction of staff, if I needed to fill out another application. She says, "Let me check." Another

lady, Lady Number 2 came out, asked me my name, and said she would call the chef. And several minutes went by, a third person came out and says they weren't hiring cooks. So I looked to the side of me, there was a sign on a board stating the different positions that were available, and the last job was [sic] cooks. And I asked her what that meant. She says it meant pastry cooks.

I find it curious that if Respondent was hiring only pastry cooks, that the advertisement and the wall notice in the office did not refine the request to say so. The skills are quite different and Respondent's hiring office would not want to waste its time dealing with cooks who were not qualified to perform pastry work.

Why has Respondent chosen these two individuals for layoff when it closed down the swing shift? Was it because they wore union committee leader buttons or were they just caught up in nondiscriminatory circumstances as the shift was dispersed? Respondent's explanation is that Aguilar, although a day-shift employee who worked for America, rather than room service, was nonetheless a victim of the reduction-in-force. It contends that as a new hire he was not as familiar with the menu as the others who were kept on, but transferred.

The problem with Respondent's defense with respect to Aguilar is that it laid him off for a reason which can only be described as "for cause," failure to pass the 90-day introductory period. If that is the reason given on his personnel action form, why then aren't there incidents to support it? His work record appears exemplary and no one contends otherwise. If he was laid off for business reasons and without any fault on his part, why does Respondent suggest it was for cause, when the others who were laid off during the closure of the swing shift were told the true reason, reduction-in-force. Thus Respondent has presented inconsistent reasons for letting Aguilar go. Clearly the reason which it placed in his file was false. That being the case, it seems to me that the General Counsel's prima facie case stands un rebutted. Having given a false reason, it now seeks to add a second reason, which is more difficult to prove. At least as likely a motive for the decision was the fact that Aguilar, a relatively new employee, had the temerity to begin wearing a union committee leader button and an easy opportunity had arisen allowing him to be folded into an otherwise lawful business decision. Having given a false reason, I see no reason to credit the other. I find Aguilar was unlawfully included in a layoff having no relationship to the job which he worked.

Similarly, I am unimpressed with Respondent's defense regarding Schafer. He was facially laid off for a nondiscriminatory reason, the swing-shift shutdown. He is clearly a valuable employee in all respects except for his having decided to wear the union button. Why then, when he answered the ad for cooks was he treated so shabbily? The hiring office never did answer his question. He asked if he needed to file a new application. The lady then said she needed to call the chef, whom I presume was Executive Chef McEvoy or possibly his assistant, Savoy. After getting an answer, she told Schafer that Respondent wasn't hiring cooks, despite the clear statement in both the advertisements and on the hiring office wall that they were. When that discrepancy was shown, the lame response was that

the advertisements were for "pastry cooks." Yet no one ever asked Schafer if he could do that, an easy accommodation which could be and normally would be made to a former employee who had left in good standing.

I find the claim that Respondent was seeking only pastry cooks is a false reason. If they were hiring only pastry cooks, they would not be luring line cooks with such an advertisement. They would have said "pastry cooks" in the ad.

What the treatment shows is that Schafer had not been laid off in good standing—the executive chefs did not want him back. Why not? The only reason it seems to me is because he had been laid off for his union activities and they did not want him to return. They lied to him in order to get him out of a hiring track. There would be no need to do that if they had been treating with him honestly. The manipulation he received when he tried to get rehired, therefore, seems to me to be an admission that he had been originally laid off for an illegal reason. I so find. Respondent violated Section 8(a)(3) when it laid off Schafer.

#### 9. Clara Montaña

I have previously discussed the fact that in March EDR Head Chef Gallegos had unlawfully attempted to make Clara Montaña remove the union button which she had chosen to wear and that Sous Chef Don Meza had banned her from wearing the button. In this section I will deal with the General Counsel's contention that she was unlawfully disciplined on June 5 for an incident occurring June 3. After the rule against wearing buttons was officially abandoned, she had continued to wear it. She had also signed the March 11 letter.

The discipline seems to have begun on June 2 when EDR chef Salvador Ortiz spoke to her. She testified, through an interpreter, as follows:

[MONTAÑO:] He [Ortiz] said that I was banned from talking to my co-workers, that I wasn't supposed to talk to anybody, not even to get their phone number or to ask them out or go to any parties with them.

....

Q. (By MR. FELDMAN): Ms. Montaña, what did you say to Chef Ortiz, when he told you that?

A. I—I want to know why, why he was telling me that.

Q. And what did he say?

A. He said that I couldn't speak to anybody.

Q. Did he ever tell you why?

A. Honestly I don't remember any more.

On June 5, EDR Sous Chef John Miller issued Montaña a warning notice for having run out of soup on June 3. The circumstances are in dispute, but Montaña is certain that she was not the cause of the problem. She remembers that when she arrived at work at 10 a.m., her scheduled start time, she was told by coworker Diana Chavez, who had begun work at 6 a.m., that they were almost out of soup, only three bags were left. Chavez said Ortiz already knew about it and shortly thereafter three more bags of soup were delivered. At some point Miller arrived to begin his shift. At noon they were running out again and she reported it to Miller. She says he had gotten two more



bags and was in the process of heating them up when Ortiz noticed the problem. Irritated, he asked Montañó why there wasn't any soup and she told him that Miller was heating some. Miller, overhearing, then handed her a heated soup bag to be placed in the bin.

From her perspective, she had done what she was supposed to do.

Ortiz denies ever telling her that she could not speak to other employees as she described. Of the soup incident, he says he had received a number of complaints that the EDR food bins were too often empty and the "customers" had been complaining. He and Savoy had met with EDR employees in May to correct the problem, and this incident seemed to be a recurrence. He says he noticed the empty soup bin and spoke to Montañó about it. She told him she would refill it. He asked her a second time, and she said she'd do it as soon as possible. At that point Miller, overhearing, handed her a full bag of soup from the hot box, meaning that it had already been heated and was simply awaiting delivery to the food line. From his point of view, she should have gone to the hot box herself as soon as the previous supply on the line had been exhausted.

Because she had failed to perform her task he issued her the warning, directing Miller to handle the paperwork.

Inconsistently, Assistant Executive Chef Savoy testified that the decision to warn to Montañó was the result of observations he had made. In fact Ortiz never said Savoy had anything to do with it. Savoy claims that the warning was for failing to keep her station stocked. One day in early June he came to the EDR for lunch. He says he saw five of eight food pans empty. As a result he spoke to Montañó, saying they had just had a meeting about empty trays. She gave the excuse that she was covering for another employee who was on a break; to Savoy the excuse was unacceptable. He spoke to Savoy and Miller about Montañó. He also says that in the next 10 days he saw the same thing two or three times.

Curiously, Respondent chose not to examine Montañó on the point. It seems to me that Montañó would well remember a mild scolding by the assistant executive chef in the circumstances he described. Yet Respondent made no attempt either to attack her version or to bolster its own version through her. It asked her no questions about the incident.

Moreover, Respondent did not call Miller to testify about his recollection. That failure, it seems to me, lends credence to Montañó's description of what happened. First, there seems to be no reason to doubt her testimony that insufficient soup had been prepared on the morning in question and that Ortiz was aware of it even before she arrived. Furthermore, there is no doubt that Miller was aware of the problem and was in the process of solving it when Ortiz came upon it. Miller knew of it because Montañó had told him. The delays in getting the soup to the serving line were the principal issue, not the server failing to place it in the bin. It was a production problem, not a server problem.

Why then blame Montañó? Was it because she was wearing the union pin and had signed the March 11 letter? Under her version, Ortiz had, only a day or two before, given her some strict instructions not to talk to employees outside work. She was at a loss to deal with that instruction and didn't know what

to make of it. It seems an unlikely thing for Ortiz to have said. Yet, Ortiz' denial did not appear credible to me either. Why would Montañó make such a story up? The more probable analysis is that Ortiz and Savoy had seen her consistently wearing the pin and wanted to see if they could stop her from further efforts to persuade fellow employees to join with her and the others. An interdiction such as the one she described would accomplish just that. Furthermore, if a paper trail could be created to justify firing her, that would eventually work, too.

The decision to discipline her really seems to have come from Savoy, though Miller signed the form and it is conceded that it was issued per Ortiz's instructions. Yet somehow, Savoy and Ortiz could not get their story straight regarding the reason for the warning. Ortiz said the soup was the reason and Savoy asserted it was because of a failure to keep five food pans filled, even adding that the problem persisted for days afterwards. Moreover, had Miller been called as a witness, it seems likely that he would have supported Montañó's version and therefore demonstrated that she had done what she was supposed to do, reported the matter to him.

On balance, the evidence favors the General Counsel. Montañó was the victim of three Section 8(a)(1) violations, two of which clearly were aimed at her button wearing and the third having the same purpose, to stop her from speaking to fellow employees. When an incident occurred in her work area, Respondent decided to blame her falsely for it.

As a result, I am compelled to find that Respondent violated Section 8(a)(3) when it issued her the warning on June 5. It had a clear tendency to weaken her hire and tenure of employment because of her union activity, button wearing, letter signing, and a perceived willingness to speak to others off the job.

#### 10. Jennifer Durham

Jennifer Durham was hired on March 11 as a cashier. About 2 weeks after her hire she began wearing a "union yes" button. The manager of the Village Streets at the time was Millie Stewart; her assistant was Philip Mathews.

On June 26 Respondent discharged Durham for mishandling funds. The incident occurred shortly after Respondent had discovered several employees had figured out a way to embezzle money from their cash drawers. At least two employees had been fired.

Respondent operates a computerized cash register system, which involves centrally logging on and off the system. Even so, the register can still be operated when logged off. Respondent requires that each transaction generate a customer receipt, which even if issued when the register is logged off, will eventually be transmitted to a central computer known as the Info Genesis Bank, which tracks all transactions.

The theft ring had figured out that if one rang up a sale, made the change and then voided the transaction that they could pocket the difference at the end of the shift. Durham's transgression closely paralleled that tactic.

On the day she was discharged, Durham was at a cash register in one of the fast food outlets. One of the managers, Stewart, thinks the incident occurred at the Brew Pub, and it is unclear from the record if the Brew Pub is on the Village Streets. In any event, a customer had purchased some chili valued at

\$2.75. Mathews, making his rounds, observed some napkins fly off the customer's tray and, while helping the customer, noticed the absence of a receipt. He went to Durham and punched the "last receipt" command on her register and saw "two sodas." He asked her why there was no receipt and she explained she had accidentally logged off and when she made the sale, the register had not generated one. Suspecting a theft attempt, he telephoned Stewart and then pulled Durham's cash drawer for the purpose of making a count.

Their review of the situation determined that the drawer held a \$2.75 overage and no evidence that a chili sale had been made. Double checking with the Info Genesis Bank led them to the same conclusion. No sale had been entered into the cash register, but the drawer contained an overage in the exact amount of the chili.

Durham's explanation:

Q. [By MR. FELDMAN]: Okay. What happened—what happened after the gentleman ordered the chili bowl?

A. Uh—I tried to ring it up, and then I press wrong button, and then it went to ~~logged~~ on or ~~logged~~ off, since I was logged on, I pressed ~~logged~~ off, and it said "Confirm, yes or no" and I press "Yes," that's when the cash register opened.

Q. And these are—these are buttons on the cash register?

A. Yes.

Q. Could you take us through that procedure a little slower? When the man ordered the chili bowl, do you recall what—which button you pushed?

A. I don't remember what button, because I press—I accidentally press a button which I don't know which one.

Q. And what—what displayed, on the cash register, after you pushed that button?

A. It went to "Logged on or ~~logged~~ off."

Q. Okay. And what did you do then?

A. Since I was logged on, I pressed 'logged off.'

Q. And then what happened?

A. And then it went to "Confirm, yes or no."

Q. And what did you push?

A. "Yes."

Q. Okay. What happened then?

A. That's when the cash register slid open, and—

Q. What happened after the cash register—is that the cash register drawer?

A. Yeah.

Q. What happened then?

A. I put the \$3 in there, and gave the man 25 cents, his change.

Q. Okay. So the gentleman gave you three dollars?

A. Yes. [Transcript corrections shown]

She doesn't really dispute the fact that the register held the \$2.75 and Respondent doesn't really claim that she had yet stolen any money. Even so, her handling of the matter requires some explaining. Assuming that she had pressed some button accidentally, she says the register asked her if she wanted to log

on or off. She chose to "log off" because she knew the drawer would open and she could make change.<sup>14</sup>

Yet both Mathews and Stewart point out that whether one is logged on or off the register will operate so long as the drawer is open and will still generate a receipt. That receipt is in both paper and electronic form. The electronic version can be called up and reviewed on the register screen. None was found to have been generated. Thus, whatever Durham's explanation may be, her logging on and off the system, doesn't answer.

Accordingly, I find that Respondent's version here is the more credible of the two and therefore reject Durham's version as nonresponsive to the cash handling procedural error.

The next question is whether or not Respondent treated Durham more harshly than it has treated others. It is difficult to find disparate treatment here even where there is at least one person who was not discharged on the spot for what might be characterized as a similar cash handling error. That is because Respondent was still smarting from the discovery, only a week or so before, of the embezzling which had been occurring. In this circumstance, I am unable to conclude, under the *Wright Line* doctrine,<sup>15</sup> that Respondent would not have taken the action it did had Durham not worn a union button. Clearly it would have taken the same action, union button or no. The General Counsel's observation that the amount of money involved is too small to be of any concern is misplaced. If the procedure worked once to create an overage which could be pocketed, it would work numerous times and the small amounts, undetected, could add up over time.

This allegation will be dismissed.

#### 11. Roger Trude

Roger Trude was hired January 21 as a porter in the Village Streets, generally working as a cleanup person during the day. He began wearing a union "solidarity" pin daily at some point.

The complaint alleges that on July 3, production chef Arvy Dumbrys violated Section 8(a)(1) in two ways: first, by attacking Trude's attitude for wearing the union button and second, by inviting Trude to quit in hostile terms related to the pin-wearing. Dumbrys agrees they had a conversation on that day but denies both charges and offers a contrary version. The fact pattern here presents a wide credibility divergence. I credit Dumbrys in the circumstances.

Trude's testimony is short and almost too succinct:

[TRUDE]: About five o'clock, while I was doing my run upstairs, near the deli—uh, a steward named Junior came up and said that he wanted to talk about schedules to—so I should go down to Chef Arvy's office.

So I went to Chef Arvy's office. And I was asking about the schedules. Then when I came in—uh, he said "Uh, why are you coming in here with this attitude?" I

<sup>14</sup> All agree that it is normal for the drawer to open when one logs off. The purpose is to allow the cashier to remove the tray at the end of a shift. When the drawer is shut thereafter, it cannot be opened again until someone logs on.

<sup>15</sup> *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); also *NLRB v. Transportation Mgt. Corp.*, 462 U.S. 393 (1983).

didn't say anything. Then he said, "Come in and sit down."

Uh—then he—he then continued—uh, "why are you gonna—basically, with this attitude," then he—uh, told Charles to shut the door, then—uh, Wendy Washington was outside the door, so—

Q. [By MR. FELDMAN]: Okay. So she was not present in the conversation?

A. No. She was outside the door—

Q. Okay.

A. —when he shut the door.

Q. Okay. What was said then?

A. Uh—he said, "I heard you've been talking bad about the Company."

Q. That's what Chef Arvy said to you?

A. Yes.

Q. Okay. Did you reply?

A. Uh—no, I did not reply.

Q. Okay. What did he say then?

A. Uh—"With that attitude, why don't—why don't you go home"—uh, then he pointed to my union pin, okay?

Q. What did he say when he pointed to your union pin?

A. "Why don't your union get you another job? Why don't your union get you another job if you don't like it here?"

Q. Anything else said?

A. Uh—I said "I was looking for work." Uh—he said, "Are you looking for work?" I said "Yes." Then—uh, he said—uh, "You know why you can't find work? Because you have no skills and you can't find work anywhere else," that's why I'm working at ARK.

Q. Did you respond?

A. Uh—no.

On cross-examination Trude contradicted himself in at least one significant manner. He conceded that Dumbrys told him he was doing a good job:

[By MR. TAYLOR]: Did Chef Arvy to speak to you about your work performance, during this meeting?

A. Work performance?

Q. Yeah? I know you talked about your scheduling—

A. Oh, yes, yes. He—uh—

Q. Yeah, he did, didn't he?

A. Yeah, he said I—I was doing a good job, I came on time and that I did my work.

Dumbrys has an entirely different take on the interview, which he, too, says was short. According to him, a sous chef had told him that several employees had told him that Trude was saying bad things about the Company. Dumbrys says he always addresses such matters and decided to call Trude to the office to find out what was happening. Dumbrys denies that the Union was discussed or was ever a consideration in any way (he couldn't remember whether Trude was even wearing a union pin) and says the entire focus was on determining Trude's attitude toward his work. Dumbrys's testimony:

[DUMBRY'S]: . . . And I said, well, right now we're getting some unofficial reports that he's been basically talking about the management in a very negative fashion, and also of ARK, in general. And I asked him if he has done so, and he said no.

And I told him, "Well, we're not going to sit here and decide whether or not you did or you did not, but let me just tell you that if you, in the future, ever do decide to do this, or if you ever know of anybody else, please bring it to my attention, because it's something that we do not condone within the ARK properties."

I also asked him if he was unhappy with the position that he's at, if he would ever be interested in being promoted to a food handler, and—

Q. [MR. TAYLOR]: What position does he hold—did he hold then?

A. Dish utility right now. And the next step up, in order for a promotion, would be to a—something equivalent to a food handler.

Q. All right. What'd he say to that?

A. He said, at this point in time, he's happy where he is . . .

The main point on which they agree is Trude's admission on cross-examination that Dumbrys told him he was doing good work. Dumbrys's direct testimony that if Trude was unhappy with his current position, he would consider promoting him if he wanted is consistent with a positive attitude towards Trude. On the other hand, Trude's testimony is internally irreconcilable. He said on direct that Dumbrys was so upset with him that he told him to find another job if he was so unhappy, punctuating that with a challenge to the effect that the Union should get him another job, but since he was so unskilled he wouldn't be able to find one.

Frankly, Trude's direct testimony is not believable. Dumbrys would not insult and antagonize him so strongly and then immediately tell him he'd been doing a good job. I think the latter is true, that Dumbrys did tell him he was doing a good job and if he was unhappy with the one he was doing, please let him know because he could arrange a promotion to food handler. Having made that finding, it would be illogical to credit the remainder of Trude's direct testimony.

Accordingly, I find that Dumbrys did not say what Trude attributed to him. Specifically, I do not credit Trude's testimony that Dumbrys attacked his attitude for wearing the union pin nor do I credit his testimony that Dumbrys invited him to find another job. This allegation will be dismissed.

## 12. Jesús Serna

Jesús Serna was hired on May 1 as a lead dishwasher covering graveyard shift dishwashers. He worked from 11 p.m. to 7 a.m., 4 days a week. His immediate supervisor was Valerio Rodriguez, the head steward. Because Rodriguez worked days, they did not see each other except at the shift change in the mornings, about 6 or 7 a.m. Within days after he was hired Serna began wearing 16 or 17 union pins on his uniform jacket every day he worked, except Tuesdays when he didn't wear the jacket because he was cleaning the hoods, very dirty work.

The complaint alleges that Rodriguez created the impression of surveillance and unlawfully interrogated Serna in the evening of July 29 and then the following morning, July 30, discharged him because of his union sentiments. Respondent argues that Serna was insubordinate in several regards, including belittling Rodriguez and refusing to carry out some direct orders. Serna denies doing both. As a result of his supposed lack of respect for the supervisory hierarchy, McEvoy made the decision to let him go for failing to pass his 90-day introductory period.

In the early evening of July 29, the Union held a mass rally in front of NY-NY. According to Serna, and not really disputed, “thousands” of union members gathered in front of the hotel to ask Respondent to recognize it. About 15 of Respondent’s employees attended, including Serna. Afterwards, he reported to work in the America dishroom. A short while later, he had occasion to go to the Gallagher’s dishroom. When he arrived, he saw Rodriguez speaking to a female dishwasher assigned to that room. Serna does not know her name.

According to Serna, Rodriguez asked her something to the effect, “[W]hy she not go to the rally to see me screaming” and—uh, my answer was—uh, ‘Well I’d do it again for better life and better supervisors, you know.’”

At the end of his shift, about 6:30 the next morning, Rodriguez called him to the office and discharged him for failing to pass the 90-day introductory period. When Serna asked him to be more specific, Rodriguez told him he didn’t have to give him a reason.

Rodriguez did recite some instances of poor performance and a failure to follow a direct order resulting in assigning a clean-up job to the following shift. Yet, I am more troubled by the timing of it all. In viewing Serna as he testified, it is clear that he has a prickly personality. Moreover, he admitted thinking little of Rodriguez, believing at one point that he did not have to take directions from anyone but the graveyard chef. He thought Rodriguez operated the graveyard shift understaffed and told the graveyard chef his view.

Still, the timing of his discharge is nearly overwhelming, following his attendance at the rally by only 12-1/2 hours. Furthermore, there is the matter of the statements made to the female dishwasher.

The General Counsel argues that the remark created the impression of surveillance and constitutes some sort of coercive interrogation. I am not persuaded. Serna had gone to the rally in full view of anyone who wanted to look. Indeed, it was such a public matter that “surveillance” seems to be an antilogy in the circumstances. The Union was pleading for the world to look and listen. That Rodriguez observed what was happening can be no surprise.

Later, when he made his remarks to the other dishwasher, it seems to have been made in a manner designed as banter or man-to-man repartee rather than anything meant seriously. Serna had been out in front of the NY-NY making a lot of noise. Moreover, as usual, he was wearing his jacket covered with union buttons. He was a natural target for such banter. Certainly no threat was uttered and no coercion of any other nature offered. Indeed, Serna responded in kind. He said he was demonstrating for a better life and better supervisors. Even

if Rodriguez knew Serna actually meant the latter, he took no offense. He knew if you give banter, you get it back. This entire incident is not probative of any unfair labor practice.

This leaves the timing and the after-the-fact-memo written by Rodriguez on July 31 at McEvoy’s instruction. In fact there is no documentation supporting any of the perceived shortcomings which Rodriguez cited in the memo. Indeed, Rodriguez testified it was not his intention to discharge Serna, even though he regarded him as an annoyance. It was not until he spoke to McEvoy that the decision was made. Curiously, Rodriguez says his conversation with McEvoy when the discharge instructions were given was about 10 days earlier, somewhere between July 20 and 23. If that is so, why didn’t the process take place around that time instead of on July 30, 12-1/2 hours after Serna attended the rally? In that situation, I am obligated to find that no decision to discharge him was made until he was seen at the rally, probably by both Rodriguez and McEvoy, who all agree really made the decision.

I think it is fair to say that Serna did display some shortcomings. He is opinionated and thinks he can do the job better than Rodriguez. Yet Rodriguez didn’t mind Serna’s personality. Insofar as Serna’s multiple failures to perform his duties are concerned, if they happened, they were not regarded as significant. If they had been, Rodriguez or someone else in the managerial hierarchy would have counseled Serna. Nothing like that occurred and it is doubtful that such items, even if they happened, had any bearing on the decision to discharge him. They are simply an after-the-fact-justification, a means to conceal the real reason. Serna was a vociferous pin-wearer. I find his discharge to have violated Section 8(a)(3) of the Act.

### 13. Maria Guadalupe “Lupe” Carillo

Lupe Carillo is a fry cook at GYG on the day shift, having been hired in December 1996. She signed the March 11 letter and began wearing the “union committee leader” button daily shortly thereafter.

The complaint raises three issues regarding Respondent’s alleged treatment of her. The first is a warning on June 5 for failing to call in 4 hours prior to an absence from work. The second is whether in August or September Chef Sergio Salazar threatened to prevent her from getting a job with another employer, the Motown Café. The third is whether Salazar on October 2, shortly before the hearing in this matter began, made an unspecified threat to influence her testimony before the Board.

Even before the first incident alleged by the General Counsel to be unlawful occurred, Carillo was in some trouble. On August 3 she had volunteered to cover a shift for an employee named Salcedo, but failed to come to work as promised. On August 4 she didn’t come to work either. On August 5 Sous Chef Roberto Arriola gave her warnings about both matters. (R.Exh. 9 and G.C.Exh. 25.)

The warning which the General Counsel asserts is violative is for the August 4 absence, which recites that she didn’t call about a needed absence until 8:30 a.m., when her scheduled start time was 8 a.m.

On that morning, she says, she had to obtain an identification card for her daughter so she could go to work. Then, her husband’s car broke down so she called Salazar at home between

6:10 and 6:15 a.m. She explained the situation to him and says Salazar gave her the day off. But since it was his day off, he told her to call chef Roberto [Arriola] to advise that she wouldn't be in. She agreed. She says she did so a few moments later, learned Arriola wasn't there and left a message with someone.

Salazar testified: "She called me in the morning, about six forty-five, six forty, and she woke me up, and she asked me if she can take the day off. And I told her that that was my day off, and I won't be at work, so she's got to check with my assistant. That (sic) [If?]he gave her the day off, it will be fine for him, but she's still got to call my assistant and ask him for the day off."

Arriola denies that she called him at that time. His warning notice shows that she called half an hour after her shift started, although when he testified, he thought it was as late as 10 a.m. He observed that he has a pager which he carries all the time and that all of the employees in his department, including Carillo, have been given the number. He says she did not call the pager that morning.

Frankly, I must disbelieve Carillo here. She asserts that Salazar gave her the day off. That seems most unlikely since he was not scheduled to work that day, was unaware of the manpower needs that morning, and had left those decisions to Arriola. His version, therefore, seems much more likely. Thus, I find that he told her to call Arriola and for some reason she did not do so until sometime after her start time.

Her explanation, that she needed to assist her child with an ID card matter hardly qualifies as an emergency and thus Respondent's rule about calling in 4 hours in advance seems to apply.<sup>16</sup> Even if the car broke down within the 4-hour period, the obvious question is why she called Salazar at home. Respondent has a procedure by which absences and latenesses are to be handled. She should have been calling the office where a substitute could have been timely arranged. She clearly used poor judgment here and, combined with the unexcused absence the day before, it was improbable that her conduct would escape notice. Counseling or discipline was in the offing.

I conclude, therefore, that the discipline would have occurred whether or not she wore a union pin on a daily basis or had signed the March 11 letter. It is only a counseling, not a warning, and is a tempered response to her conduct. This portion of the complaint will be dismissed.

Carrillo says sometime in September she spoke to Salazar about getting another shift. When he told her he could not, she said, conspicuously snippily, "Fine, because I had gone and looked for work—uh, at the—uh, over at the Motown Café." She went on:

Q. [By MR. FELDMAN] And what did he say?

A. Uh—jokingly, he said that, by only looking at the button I was wearing, they would shut the door, you know, in front of me.

<sup>16</sup> The General Counsel cites an incident involving Robert Jackson who called in less than 4 hours before his shift and who did not suffer discipline. In Jackson's case his wife had become ill and had to be taken to the hospital. There is no comparison to the two cases. Jackson's was a true emergency; Carillo's was not.

Q. Did he say anything else?

A. Well, no. He was laughing.

Then, according to her, he said he would rather be dead than join the Union.

Salazar denies making the "rather be dead than join the Union" remark, and puts a different cast on the Motown Café discussion. He thinks it was in August. He is a personal friend of the chef at the Motown, and Carillo seemed to be aware of it. According to him, she asked if he would help her get a job there, and he simply told her he would see what he could do. He denies saying anything about her button and denies saying the Motown would shut the door in her face. He does agree that he did not contact his chef friend about her, explaining that after his conversation with her, he remembered that his friend had told her that the Motown wasn't hiring, so he thought it would be a waste of time.

The hearing in this matter opened on Monday, October 6. Carillo says that on the previous Thursday [October 2], she went to him to ask for some time off for a hearing. She testified:

I told Sergio that I was—that I had a court date, and I was going to tell what he had explained to me. And he answered—uh, there we would be telling the truth, we wouldn't be adding nor leaving things out, that if I—that if I made any mistakes I would be automatically—uh, terminated from my place of employment.

Salazar's recollection is different. He says it happened a week or so earlier and that he had come into a work area during the middle of a conversation between Carillo and another employee named Antonio. He remembers that she sounded worried in some way. She seemed to wonder out loud if "if she can change something, but I didn't even know—I wasn't really sure what they were talking about, but she can change something about a—something about a court, or a federal thing, or something, something like that."

He said she went on: "[S]he mentioned something about—about lying, or about changing a version, or something like that. And she said—well, I told her—she asked me, I said, about the version, or something. I said I didn't even know what you guys are talking about. I mean, if you guys—court, I mean, court is, I mean, is serious, I mean, but even if I've never been in court, this is the first time. I'm not saying it's some—I know that stuff is serious. I mean, if you guys lie, or something, I mean, it might affect you, or—I mean, it won't look good ~~on you, no~~ [you know.]" (Transcript correction shown.)

He continued: "She didn't tell me that she testified, or something, but the only thing, it was something about—because she wasn't really talking to me, she was too—too—she was talking to Antonio, but she was looking at me, and then she—I mean, she looked at me like—like she was talking to me. And, all I said was that ~~their~~ [they're]—if she lies, or something, or if she doesn't say the truth, that may affect her in some [manner]—~~I mean, that~~ that was it." (Transcript corrections shown.)

From his perspective, he was unaware that she was speaking of an NLRB hearing; he thought it was a court date, naturally thinking of action in a local court. Moreover, he was entirely unaware that she was talking about a transaction between them.

In analyzing the latter two incidents as well as being mindful of the first, it is apparent to me that Carillo has a manipulative feature to her character. She is willing to play with facts. She distorted what Salazar had said with respect to whether he had given her the day off in August and she admits that she told him, after she had asked for another shift, that she had already sought work at the Motown, even though that was not true.

Thus, I am not willing to credit her claim that Salazar told her the Motown would shut the door in her face if she wore the button or that he'd rather be dead than join the Union. Furthermore, I don't believe her testimony that he threatened her with automatic discharge if she didn't tell the truth before the Board.

In reviewing the testimony of both witnesses, I find Salazar's to be the most probable and therefore the most credible. He didn't know what she was talking about and only gave a general, common sense answer about telling the truth in court when she seemed to draw him into a conversation she was having with someone else (again, a sign of a willingness to manipulate). He certainly had no idea regarding what "court" action was involved. Any reference he appears to have made about lying in court was to the effect that if one lies in sworn testimony, one can get into trouble—most probably with the outcome of the case or with court itself. His version makes the most sense, is noncoercive in the context and is credited. Therefore, I conclude that the General Counsel has not presented a creditable version of the facts and this portion of the case should be dismissed.

#### 14. Bernardino Hernandez Cruz and David Hernandez

Bernardino Hernandez Cruz (Bernardino) and David Hernandez (David) are father and son, respectively. Bernardino works as a dishwasher at America, while David is a bus person at America. The operation is big and they do not work near each other. Bernardino speaks very little English; David, on the other hand, is fairly fluent. Both of them wore union committee leader pins on a daily basis.

The complaint alleges that Respondent unlawfully interrogated Bernardino in May and then "disciplined" him August 9 by suspending him for 3 days. It also asserts that it "disciplined" David on August 25 by suspending him for 4 days. Both suspensions were allegedly because they wore union pins. Respondent contends that it did not interrogate Bernardino in any way and that the suspensions were for good cause: that Bernardino was not following the direct instructions of his manager, Valerio Rodriguez, and that David, upset with the treatment of his father, made threats against Rodriguez which warranted the discipline.

Bernardino testified that in early May he was called to the office. He says David and three managers were present, including his immediate supervisor, Valerio Rodriguez, Sous Chef Mike Siwec (sometimes called "Sedgewick," due to pronunciation), and Executive Chef Damien McEvoy. David seems to have served as a translator.

Bernardino says that Siwec and McEvoy asked him if he really was a leader for the union. He says he did not respond. He did not testify about anything else which may have occurred in the meeting.

Siwec testified that he attended the meeting at Rodriguez' request. He also says that McEvoy was not present. He said: "Valerio asked me in to witness and explain to Bernardino what his job activities are and performances, his duties in the kitchen are . . . ." He remembers telling Bernardino that "Valerio is his supervisor" and that's all he said. He specifically denies asking if Bernardino was a union committee leader; in fact he denies that the union was mentioned in the meeting at all.

Siwec's testimony makes sense only if understood in the context that Valerio Rodriguez was having difficulty getting Bernardino to do the work he was assigned and that Bernardino did not want to take directions from him. Rodriguez does not describe the May meeting specifically, but he does describe the problem he faced in another incident, apparently in June or July:

(By MS. WASIELEWSKI): . . . Now, tell us what you asked Mr. Bernardino Hernandez to do?

A. To get a dry mop and clean the spill in the middle of the—of the dining room.

Q. Okay. And what did he say?

A. He said he don't have time to do that.

Q. And what did you say when he said that?

A. I said that—that he—he—he's doing the shift and he can try to make it. He—he runs out of time it's okay, but before he does anything, he starts, you know, complaining.

Q. He started what? I'm sorry.

A. Complaining.

Q. Complaining?

A. Yeah. There was not enough time and he was too busy, stuff like that, and he didn't do it.

With respect to the May incident, I find it curious that Bernardino's son David did not testify about it. Presumably he was there either as a translator or to assist his father. Yet he did not testify about the "interrogation" at all. Had it occurred, it seems highly probable that he would have corroborated Bernardino. He did not. Furthermore, Siwec's testimony makes a great deal of sense. It is clear that Bernardino has difficulty accepting directions from managers. Bernardino even supports that conclusion; he did not want to take orders from Valerio Rodriguez:

(By MR. TAYLOR) Okay. And at that time you asked Mike [Siwec] whether who—who was in charge, either he or Valerio? Just—was—you can just answer yes or no on that.

[HERNANDEZ CRUZ]: Valerio.

Q. I'm sorry. Did you ask Mike—let's get this straight first. Did you ask Mike who was in charge of the restaurant, either Valerio or Mike?

A. Yes—

Q. Yes. Okay. And what did Mike—

A. —I asked.

Q. I'm sorry. What did Mike reply to that question?

A. He said, "Go to Valerio, he's the one ordering around, he's the supervisor."

Q. Did you tell Mike, at that time, that "I do not want Valerio to talk to me again"?

A. Yes, I did.

On August 9, Bernardino was again called to the office. David was there again, as was a chef named Jeff, Rodriguez and dishwasher lead Darrell Jackson. He says he was issued a 3-day suspension for refusing to follow a direct order to clean up a sink. Rodriguez' suspension notice does not mention the sink, but refers instead to Bernardino's refusal to follow a direct order to refill paper and soap dispensers, responding "if I got time I will do it," followed by a second reminder, but leaving work without having done the task. An entry on the document (made by someone else) references the conduct as "insubordination." Rodriguez' more detailed testimony which I shall not recite fully supports the suspension notice.

Bernardino asserts that he did do the sink, but it was later than asked, admitting that he never told anyone that he had done so.

It is clear to me that this individual was not performing well and was engaged in some sort of passive resistance to directives issued by managers, particularly Rodriguez. It may be true, as the General Counsel asserts, that he was given some conflicting directions from time to time by different supervisors. If that occurred, however, he did not inform those supervisors of the conflict, but only chose to do what he thought was important. He did not communicate well, perhaps because of the language barrier, but more likely because he didn't like being told what to do, by Rodriguez or anyone else. Such behavior will not go unnoticed for long. Clearly whatever discipline was levied upon him had nothing whatsoever to do with his wearing a union button.

David's circumstances are a little different. He is a far more responsible employee. He is generally respected by his managers and seems to do a good job. Even so, on August 25 he received a suspension "pending investigation" which lasted 4 days. On that day McEvoy called him to Joe Albanese's office at America to give him the notice. McEvoy asked David if he knew why, and David replied he did not. McEvoy said it was because he had made a threat against Rodriguez 2 weeks previously. David denied making such a threat. It should be observed that is the time frame in which Bernardino had received the suspension.

David says that 2 weeks before his own suspension his father had told him that "people" (meaning Rodriguez and his assistants, probably leads such as Darrell Jackson and Martin DelRio) had been harassing him. As a result David decided to take some steps to protect his father.

This was not the first time. DelRio testified that earlier, on May 20, David had come to him to tell him to stop moving his dad around from place to place, because "there would be problems." DelRio explained that he was sorry to have to do that, but he was short of people and he had no choice. DelRio says, in retrospect, that he regarded that as a threat, but I do not so perceive it and I do not think he did at the time either. Still, a reference to "problems" while vague, is open to such an interpretation, given the right context. (It might have only referred to the possibility that Bernardino might cause problems if so treated, not that David would.) Even so, the incident shows

that David will step up to defend his father from perceived mistreatment, whether true or not.

On August 11, David testified he went to Rodriguez and: "I told him that—to stop harassing my Dad. And then after that, I just paused for a second, and I told him, 'You know what, I don't know what (sic) I'm gonna do anything, but I don't know, then I just walked away.'" <sup>17</sup> He then told America manager Joe Albanese what he had just done, and Albanese told him not to do anything dumb.

McEvoy asked him to provide a written statement of his own describing what had happened. He provided R. Exh. 1 dated August 25: "It was Tues. nite and my father told me the nite before that Valerio & other ass't. mgrs. of Valerio keep telling him that they're hassling him, so I went to Valerio told him that if he keep messing with my dad that I was going to . . . . Then I pause[d] and told him that I did not know what I was going to do!" [Edited for spelling and clarity.]

The General Counsel asserts that the remarks, whichever version is credited, do not constitute a threat and therefore do not deserve any discipline. I do not agree. It clearly started out as a threat, and just as clearly David recognized that he was going too far and stopped. In my view the threat was uttered and then dampened, probably by chagrin or a sense of wrongfulness.

In fact, I think it is fair to say that Rodriguez observed David's chagrin and realized that the threat was not as serious as it could have been. Eventually, of course, it all got to McEvoy, who did not view the matter charitably. I recognize that McEvoy is willing to target union button wearers for discharge, yet I do not think that was his concern here. He knew that Bernardino and David were father and son and he knew that David was for the most part a reliable employee. It even appears that Albanese was willing to stand up for David. No one wanted to discharge him. Even so, from a manager's viewpoint one cannot ignore threats, no matter how minor or short-lived, made against a fellow manager or employee. Violence in the workplace needs to be nipped in the bud. Respondent's short suspension of David was a tempered response to a potentially much larger problem. It cannot be seen as a discriminatory act, but one aimed at correcting and ending a potential trouble spot while at the same time keeping a valued employee. These two allegations will be dismissed.

#### 15. Sandra Jordan

Sandra Jordan was hired as a busser for America on April 2, according to General Counsel Exhibit 24, although she testified it was around March 1. <sup>18</sup> She was discharged on May 27 and the assigned reason was that she had failed to pass her 90-day introductory period. The General Counsel asserts that she was discharged that day because she had begun to wear a union button. That has been discussed to some extent in section B supra.

<sup>17</sup> His version on cross-examination is actually a bit stronger: "I told him, 'Valerio, please stop hassling my Dad, I'm getting tired of it, and I don't know what I'm gonna do anymore.'"

<sup>18</sup> The April time record shows she worked 8 hours on April 1. She may have meant April 1 rather than March 1.

May 27 was the Tuesday following the May 26 Memorial Day Monday. Although Jordan's NLRB affidavit says she had met with some fellow employees on May 26 and they had all agreed to wear union buttons on May 27, she corrected herself on the stand to say that the meeting had actually been the previous Thursday, May 22. She says she was not scheduled to work on May 25–26 and was not at the hotel those days to have made such an agreement.

She says that on May 27, while she was making coffee, Bobbie Rihel, her supervisor, came to her and demanded that she remove the button. Jordan refused, saying it belonged to a friend and she had to give it back to her. Shortly thereafter, Rihel took her to the office and discharged her, saying work was slow and they didn't need her any more. She was being chosen because she was the new hire.

Rihel denies having done or said anything about the button. She observes that the Company had earlier revoked its ban against the button. She asserts that Jordan was discharged after a series of shortcomings had become known to America's supervision.

There are several items to which she and Respondent point in support of the decision to let Jordan go. These range from a misguided attempt to promptly supply a customer with additional scoop of butter by getting some from another table (April 27) to taking a gratuity from a table and giving it to a dishwasher (May 7), to eating food outside the kitchen (May 14), to not following "standards" in removing dishes/condiments from the tables (May 17). Jordan denied the incidents involving the butter and the gratuity ever occurred. She was not asked about the others.

In addition, Respondent accuses Jordan of several no-call, no-shows. It has presented material which shows she was a no-call, no-show on three occasions: May 12, 13 (R. Exh. 24), and 25 (R. Exh. 23). Yet the Kronos records show that Jordan was at work on May 12 and 13 and that she did not normally work on Sundays such as May 25 (she says she was not scheduled that day). Respondent's explanation that the Kronos records may have been off-line on one or more of those days and entries presented manually is not credited. Respondent has a very strict no-call, no-show policy. If she had been absent, an independent investigation would have been conducted and she would have been discharged on the spot if the investigation had not uncovered some legitimate excuse. To the extent that there may have been an "absence" problem, it seems to have been caused by a problem with the sensor reading her ID card. Jordan says Rihel issued her a second card after Rihel asked if she was having trouble with hers. Rihel says she did not issue Jordan a second card, but Jordan presented both cards at the hearing; Rihel may not remember doing it, or it may have been delegated. Either way, Respondent's reliance on Jordan's attendance records as a reason for discharging her is unsupportable.

Insofar as the relative credibility of the two versions is concerned, I find Jordan's to be the more believable. This is not to say that she was trouble free in performing her job. None of the incidents, if they occurred, rose to the level where a written warning or counseling was deemed necessary. She denies them

altogether, but if they occurred, they were not regarded as particularly damning.

What seems of greater significance is Rihel's and Respondent's raising what appears to be a false reason for the discharge, the invocation of the no-call, no-show rule in the face of records and practice to the contrary. That seems contrived and is therefore evidence that Respondent is overly eager to get rid of Jordan. Indeed, it seems to be willing to manufacture evidence justifying the discharge.

In that circumstance, I find it easy to credit Jordan's description of the events leading to her discharge. She wore the button for the first time that day; Rihel tried to get her to remove it, became frustrated over her failed effort, and decided to discharge her. In that circumstance the discharge violated Section 8(a)(3) and (1) of the Act.

In response to Respondent's argument that Rihel wouldn't have concerned herself with an employee's choosing to wear a union button after the rule had been changed, I can only say the actual evidence is otherwise. The number of negative responses to employees who wore buttons after the rule had been changed only suggests to me that the revocation was a sham. Respondent simply chose other, more oblique, means to enforce it. In my opinion the rule prohibiting buttons was simply forced underground or was sub rosa reimplemented. It would be hard to conclude it was ever revoked.

### III. THE REMEDY

Having found Respondent to have engaged in certain unfair labor practices, I find that it should be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, it shall be ordered to cease and desist from interfering with, restraining, and coercing employees from engaging in activity protected by Section 7 of the Act. In addition, it shall be ordered to take certain affirmative action designed to remedy the violations found herein. As Respondent has unlawfully discharged certain employees, the affirmative action shall require Respondent to offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In this regard, I do not find the reinstatement of Ron Isomura to have been in compliance with the requirements of the Act. He was subjected to additional unfair labor practices upon his return. Therefore, he remains entitled to a proper offer of reinstatement together with backpay,<sup>19</sup> although Respondent may claim an offset for the period of time he was employed by it when he returned. Furthermore, it shall be required to make any employee whole, if it has not already done so, for any illegal suspensions found herein as well as expunging from the affected employees' personnel files any reference to their illegal treatment, whether discharge, suspension, or lesser discipline. Finally, it shall be

<sup>19</sup> It is unclear on this record whether Isomura's subsequent discharge, which is not a subject of this complaint, would terminate Respondent's backpay liability.



directed to post a notice to employees advising them of their rights and describing the steps it will take to remedy the unfair labor practices which have been found.

Based upon the foregoing findings of fact, legal analyses, and the record as a whole I hereby make the following<sup>20</sup>

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act when it

(a) Maintained and enforced written or unwritten rules prohibiting employees from wearing union buttons or pins on their uniforms or other working clothing.

(b) Directed employees to remove union buttons from their uniforms.

(c) Threatened to discharge or discipline employees for insisting upon their right to wear union buttons or pins on their uniforms.

(d) Physically removed union buttons from the uniforms of employees.

(e) Told an employee he must comply with an illegal rule barring him from distributing union literature or soliciting union membership in the employee dining room.

(f) Told an employee that he had to comply with an illegal rule barring him from arriving on the premises more than 30 minutes before his shift began and requiring him to leave within 30 minutes of the time his shift ended.

(g) Intimidated an employee from engaging in union activity by putting him on the spot with questions about the Union it knew he could not answer.

(h) Make negative predictions about the consequences of union representation without supplying a factual basis supporting that prediction.

(i) Told an employee she could not speak to her co-workers, whether in person, by telephone, or on or off duty.

4. Respondent violated Section 8(a)(1) of the Act by the mere maintenance of the following rules which have a tendency to inhibit employees from exercising the rights guaranteed by Section 7 of the Act:

(a) A rule prohibiting employees from wearing union buttons on their uniforms or other work clothing.

(b) A rule barring employees from the premises 30 minutes before their shift and requiring them to leave within 30 minutes after their shift.

5. Respondent violated Section 8(a)(1) of the Act by applying its no-solicitation, no-distribution rule to employee organizers by defining nonwork areas such as the employee dining room as a working area, thereby barring them from the protected right to lawfully distribute union literature and solicit union membership in a nonwork area.

6. Respondent violated Section 8(a)(3) of the Act by subjecting the following named employees to the discipline next to their name on the dates shown:

(a) Saam Naghdi	suspension (March 12)
(b) Saam Naghdi	warning (April 10)
(c) Clara Montaña	warning (June 5)

7. Respondent violated Section 8(a)(3) of the Act by discharging the following employees on the dates shown:

(a) Ron Isomura	(March 13)
(b) Vertis Manuel	(April 10)
(c) Jorge Aguilar	(April 10)
(d) David Schafer	(April 10)
(e) Sandra Jordan	(May 27)
(f) Jesús Serna	(July 30)

8. The General Counsel has failed to demonstrate, either as a matter of law or as a matter of sufficient evidence, any other violation of the Act.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>21</sup>

#### ORDER

The Respondent, Ark Las Vegas Restaurant Corporation, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing written or unwritten rules prohibiting employees from wearing union buttons or pins on their uniforms or other work clothing.

(b) Directing employees to remove union buttons from their uniforms.

(c) Threatening to discharge or discipline employees for insisting upon their right to wear union buttons or pins on their uniforms.

(d) Physically removing union buttons from the uniforms of employees.

(e) Telling employees they must comply with an illegal rule barring them from distributing union literature or soliciting union membership in the employee dining room.

(f) Telling employees that they must comply with an illegal rule barring them from arriving on the premises more than 30 minutes before their shift begins and requiring them to leave within 30 minutes of the time their shifts end.

(g) Intimidating employees from engaging in union activity by putting them on the spot with questions about the Union it knows they cannot answer.

<sup>20</sup> Respondent has attached certain affidavits to its brief in response to a disparate treatment argument made by the General Counsel. The General Counsel had moved to strike these as extra-record evidence. I find the entire matter to be moot as I have determined the disparate treatment evidence to be unnecessary to the disposition of the case. Therefore, I did not take either the factual argument or the response thereto into consideration in making this decision.

<sup>21</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(h) Making negative predictions about the consequences of union representation without supplying a factual basis supporting that prediction.

(i) Telling employees they cannot speak to coworkers, whether in person, by telephone, or on or off duty.

(j) Maintaining a rule barring employees from the premises 30 minutes before their shift and requiring them to leave within 30 minutes after their shift.

(k) Applying its no-solicitation, no-distribution rule to employee organizers by defining nonworking areas such as the employee dining room as working areas, thereby barring employees from exercising their right to lawfully distribute union literature and solicit union membership in nonwork areas.

(l) Discharging or disciplining employees because of their sympathies, desires, or activities on behalf of Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with Hotel Workers and Restaurant Employees International Union, AFL-CIO.

(m) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Ron Isomura, Vertis Manuel, Jorge Aguilar, David Schafer, Sandra Jordan, and Jesús Serna full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) To the extent it has not already done so, make Ron Isomura, Vertis Manuel, Jorge Aguilar, David Schafer, Sandra Jordan, Jesús Serna, Saam Naghdi, and Clara Montañó whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges or discipline, whichever is applicable, levied upon the employees named above and within 3 days thereafter notify them in writing that this has been done and that the discharge or discipline will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its restaurants and hiring offices in Las Vegas, Nevada copies of the attached notice marked "Appendix."<sup>22</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since March 13, 1997.<sup>23</sup>

f. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

<sup>22</sup> If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>23</sup> The Regional Director is authorized to require Respondent to also post the notice in any foreign language he deems appropriate.